No. [redacted]

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1995

STEINEY J. RICHARDS, PETITIONER

96-5955

VS.

THE STATE OF WISCONSIN, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

The Wisconsin State Public Defender appointed the undersigned to represent petitioner in the United States Supreme Court because petitioner is indigent. The Wisconsin State Public Defender also appointed the undersigned to represent the petitioner on direct appeal in the Wisconsin appellate system. The Wisconsin Supreme Court and Wisconsin Court of Appeals did not require the petitioner to pay filing fees related to the appeal because petitioner had appointed counsel.

The petitioner is a prisoner at Kettle Moraine

Supreme Court, U.S.
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SUPREME COURT, U.S.

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Correctional Institution, Plymouth, Wisconsin, and cannot afford the filing fee for this petition.

Respectfully submitted,

David R. Karpe

COUNSEL OF RECORD

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QUESTIONS PRESENTED

I. Does the Fourth Amendment, as interpreted by Wilson v. Arkansas, 514 U.S. ____, 115 S. Ct. 1914, 131 L.Ed.2d 976 (1995), permit a court to uphold police noncompliance with the rule of announcement without looking to the particular circumstances of the entry if the police have a warrant to search for drugs?

II. Does the Fourth Amendment, as interpreted by Wilson v. Arkansas, 514 U.S. ____, 115 S. Ct. 1914, 131 L.Ed.2d 976 (1995), permit a blanket exception that says police never need to "knock and announce" if drugs are the object of a search warrant?

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All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT
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OCTOBER TERM, 1995

STEINEY J. RICHARDS, PETITIONER

VS.

THE STATE OF WISCONSIN, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Wisconsin supreme court, the highest state court, reviewed the merits of this case, and its opinion appears at Appendix A to the petition and is reported at 201 Wis. 2d 839 and 549 N.W.2d 218.

The opinion of the court of appeals, an intermediate reviewing court, appears at Appendix B to the petition and was unreported. The table found at 183 Wis. 2d 429 and 516 N.W.2d 19 refers to this unpublished decision.

JURISDICTION

The date on which the highest state court decided this case was June 12, 1996. A copy of that decision appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment reads, in relevant portion,

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

This case revolves around police entry into the petitioner's hotel room in Madison, Wisconsin, at 3:40 a.m. on December 31, 1991.

The police did not comply with the announcement rule in effecting the entry. The magistrate who issued the warrant specifically determined that the particular circumstances did not justify a "no-knock" warrant, and he struck those portions of the warrant that would have authorized such execution.

The Wisconsin supreme court opinion relates,

> The dispositive facts for purposes of this appeal can be stated succinctly: on December 31, 1991, police executed a search warrant for the motel room of the defendant seeking evidence of the felonious crime of Possession with Intent to Deliver a Controlled Substance in violation of Wis. Stat. § 161.41 (1m)(1991-92). They did not knock and announce prior to their entry. Drugs were seized.
>
> The circuit court denied Richards'[s] motion to suppress. Richards subsequently entered pleas of no contest to the felony of possession of cocaine base with the intent to deliver, Wis. Stat. §161.41(1m), and a tax stamp violation, Wis. Stat. §139.95(2). The court found him guilty and sentenced him to 13 years imprisonment on the possession with intent count and three years concurrent imprisonment on the tax stamp count. Richards appealed. The court of appeals upheld the circuit court's ruling, relying on [State v.] Stevens[, 181 Wis. 2d 410, 511 N.W.2d 591 (1994)]. Richards filed a petition for review which we granted.

201 Wis. 2d at 843.

For the purposes of this petition, Richards does not contest this recitation of facts. The Wisconsin Supreme Court held that the particular circumstances of this case did not matter in light of the blanket exception to the announcement rule. If the United States Supreme Court finds the Wisconsin blanket rule repugnant to the Fourth Amendment, then and only then will further factual analysis be required on remand to determine whether specific exigent circumstances were present.

REASONS FOR GRANTING THE PETITION

THE SUPREME COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE FOURTH AMENDMENT PERMITS BLANKET EXCEPTIONS TO THE RULE OF ANNOUNCEMENT.

Review is requested under Supreme Court Rule 10(c) in that the Wisconsin supreme court has decided an important question of federal law that has not been, but should be, settled by this Court, and the Wisconsin court has also decided an important federal question in a way that conflicts with Wilson v. Arkansas, 514 U.S. ___, 115 S.Ct. 1914, 1919, 131 L.Ed.2d 976 (1995).

In sum, the Wisconsin supreme court has ruled in the case at bar that in drug cases, police need never comply with "knock and announce" despite the holding of Wilson that compliance with announcement forms a part of the reasonableness analysis courts must conduct under the Fourth Amendment. The importance of this federal question is beyond dispute. It affects every execution of a search warrant in the United States involving allegations of drug-dealing. This Court should subject the Wisconsin opinion to testing because to fail to review this decision invites other courts to join the Wisconsin court in refusing to balance the interests of states against neutral objective criteria in "knock and announce" cases. When probable cause exists, it is usually not necessary to perform a balancing test, but in

the case of unannounced entry into a home, due to the unusual harmfulness to an individual's privacy and physical interests, such a balancing must take place. See United States v. Whren, 116 S.Ct. 1769, 1776 (1996).

Nowhere is the protective force of the Fourth Amendment more powerful than when the sanctity of the home is involved, and the rule of announcement protects people in their homes. In Miller v. United States, 357 U.S. 301, 313 (1958), this Court stated,

> [T]he requirement of prior notice of authorization and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given a grudging application.

Despite such a long-standing doctrine of recognition of the importance of the announcement rule in Anglo-American law, the opinion below mocks this statement and encourages other state courts to bandy with the rule.

The broad precedential effect of the instant case is demonstrated by events in the Sixth Circuit Court of Appeals following the issuance of the decision. In a letter to counsel for the defendant in United States v. Bates, 84 F.3d 790 (6th Cir. 1996), dated July 17, 1996, Clerk Leonard Green of the Sixth Circuit advised that the court would

> appreciate your filing a response to the government's petition for rehearing...In connection with your response to the first section of the government's argument, the court will find particularly helpful your comment on the recent

decision of the Supreme Court of Wisconsin in State v. Richards, 549 N.W.2d 218 (1996).

(See letter in Appendix C).

The Sixth Circuit had earlier rejected a blanket rule in Bates. In fact, the court found after examining the specific circumstances of the case that an informant's report of the presence of a handgun, the fear that cocaine would be destroyed, and the barricading of the apartment door all together did not constitute exigent circumstances. No decision has yet issued on the government's petition for rehearing.

The Bates situation is simply a foretelling example of the floodgates of non-balancing that could open up if this Court remains silent about Richards. Courts in Wisconsin are already not engaging in case-by-case analysis of home entries in drug cases as a result of the lower court ruling. For example, in State of Wisconsin v. Kenneth L. Larson, (Wis. App., June 27, 1996, (95-1940-CR) (Appendix D), the Wisconsin court of appeals denied relief based on the instant case.

The issue to be resolved is not whether the state court can form an exception to the rule; it is whether such exception can be blanket in nature. Wilson v. Arkansas, 514 U.S. ___, 115 S.Ct. 1914, 1919, 131 L.Ed.2d 976 (1995), stated that

> For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.

According to the Wisconsin supreme court, this gives license to the lower courts to establish a blanket rule in drug cases. See State v. Richards, 201 Wis. 2d 839, 849, 549 N.W.2d 218 (1996):

> Wilson does not forbid blanket rules; rather, it requires such rules to be supported by the standard of "reasonableness." The Court left it to the lower courts to determine "the circumstances under which an unannounced entry is reasonable under the Fourth Amendment." Wilson, 115 S. Ct. at 1919.

Thus, the Supreme Court should grant certiorari to determine whether the Wisconsin court properly interpreted, applied or extended Wilson. See Oregon v. Mathiason, 429 U.S. 492, 493 (1977).

According to the reply brief which the accused filed in Wilson v. Arkansas, the state and all the amici curiae supporting Arkansas's position sought a blanket rule exempting drug searches from the announcement rule. Reply Brief for Petitioner, Wilson v. Arkansas, No. 94-5707, 1995 WL 120155, at *11 (U.S. Mar. 17, 1995).

Further, it would appear from statements made and questions posed at oral argument in Wilson that at least one member of the court had a concern with not making a blanket rule in the Wilson case: *28-*31. *40-*42 WL

QUESTION: Well, I mean, you're asking us--I don't find--you have some good arguments, but I don't think that's one of them, that we should exercise the judgment of whether it's a wise thing for the policeman to go crashing in or not, from his standpoint.
MR. HALL: Well, but he could make that determination based on what he knows at the scene, starting from the principle that we have an announcement requirement, but can it be dispensed with in this case for whatever reason, and if it can be dispensed with, I'm sure they'll be able to justify it. The exceptions, we agree, the three exceptions have been around for 150 years as well. There are common law cases recognizing these exceptions, and we don't dispute that they would apply now, and when they get there, if they have a reasonable basis for believing, by--and I would agree, even if you get to that point, that reasonable suspicion has to be the standard under [Maryland v.]Buie[, 494 U.S. 325 (1990)]. If they have reasonable suspicion to believe that some violence might occur, they can come in.
QUESTION: How about reasonable suspicion that evidence will be destroyed?
MR. HALL: Possibly the same as well.
QUESTION: Isn't that--
MR. HALL: But Buie--
QUESTION: Wouldn't that be so in so many of these narcotics cases?
MR. HALL: Well, we have to remember, Buie is based on safety of the officer. Destruction of evidence is not based on safety of the officer, and you might end up having to have two standards: probable cause for destruction of evidence, reasonable suspicion for safety to the officer.
QUESTION: Well, why doesn't knowledge that there's a gun in the house give rise to the safety of the officer concerned and the presence of marijuana in a place with indoor plumbing to the destruction of evidence? What more would you need to come within even the traditional exceptions?
MR. HALL: Because then you're creating a blanket exception without any belief in the facts.
QUESTION: No, not a blanket exception without any belief in the facts, these facts.
MR. HALL: Well--
QUESTION: There's a gun in that house. We know that. There's a warrant to search for narcotics.
MR. HALL: If the warrant is to search for

narcotics, then you've created a blanket exception that the police can enter any time that drugs are involved, and since 42 percent of all American households have guns in them, can you say that there's a reasonable suspicion there's a gun in the house? If you say that, there's no knock and announce. There's no need for it any more. And then, if that happens, then we're all--
QUESTION: Well, what would be enough to have a concern about the safety of the officer? You say the presence of a gun, even a gun named in the warrant, is not enough. What would it have to be?
MR. HALL: In this case, I think you could say there was enough in this case because you've got an alleged threat to the informant. You've got a threat of force by the use of that gun, not just the mere presence of a gun, but a suggestion that a gun would be used, and I would agree that that would have to be enough to get over that.
QUESTION: A gun plus someone who is reasonably suspected of being a violent person willing to use that gun.
MR. HALL: Willing to use the gun.
QUESTION: Yes.
MR. HALL: If the guy's got a history of beating up people, I would say that would be enough, given the presence of a gun as well, but these are all hypotheticals that are way beyond the facts. But just the mere presence of a gun in the cases under the Federal statute hasn't been enough. But there's one curious case that the Solicitor General cites where a guy was wearing a bullet proof vest...

QUESTION: Why isn't it reasonable--you don't have to go--they go back to Edward I. I didn't even know whether he invaded Scotland, or whatever, but they trace it back to Edward I, and even today, isn't it still a reasonable thing that you shouldn't knock down the door of somebody's house where you're not afraid of any harm, and you don't have any reason to think somebody's going to destroy evidence? I mean, why isn't that a reasonable thing, in that instance, even if it weren't going back to Edward I, and if you are, well, so much the stronger?
GENERAL BRYANT: Your Honor, that would be reasonable, and that's the State's position. The officers in the field should be able to make a decision, and Arkansas is not asking this Court to prohibit knock and announce.
QUESTION: You know that they'd require--you'd require it because it's reasonable, and

unreasonable not to knock and announce where they're not going to destroy any evidence, you have no reason for thinking so, you have no reason for thinking there's any danger, and there's this pedigree in history saying that it's unreasonable under those circumstances. What's the answer to that?

GENERAL BRYANT: Your Honor, in this case the officers had a search warrant, and there was a probable cause requirement met that there was illegal contraband on premises plus there was a weapon on premises, and in situations where the officers serve a warrant, they are at great risk, and the rule that Arkansas is suggesting would provide for the protection of officers, the protection of occupants by standards if present, as well as legitimate law enforcement principles of preventing the escape of suspects, preventing the destruction of evidence, and this Court has said that a categorical rule is best developed which will give the officers firm guidance in the field. They are not placed in the position of deciding whether I should knock or announce, or what exception applies, and the State submits that that is the reasonable approach in this case.

The Fourth Amendment does not require knock and announce, and the petitioner would have this Court elevate knock and announce as an absolute, rigid requirement of the Fourth Amendment, and Arkansas does not believe that that is proper, and it's not required by the Fourth Amendment.

If, under the facts of Wilson, the Court chose not to endorse a blanket rule, than surely, under the fact of the case at bar, the Court could not mean to give tacit approval to an analysis that begins and ends with: "Did the police have a valid search warrant to search a home for evidence of drug dealing?" In the case at bar, there was absolutely no evidence that the petitioner possessed weapons, and, in fact, no weapons were located on his person or in the premises searched. Under these circumstances, it is unconscionable to permit such an

interpretation of Wilson to stand. If, on the other hand, this is what the Court intended, this should be clarified for the benefit of those jurisdictions that do not think Wilson opened the door for imposition of blanket exceptions.

Prior to State v. Stevens, 181 Wis. 2d 410, 511 N.W.2d 591 (1994), Wisconsin had no blanket exceptions to the rule of announcement. The announcement rule was first recognized as the law of Wisconsin in Hiller v. State, 190 Wis. 369, 209 N.W. 260 (1926), overruled on other grounds, Glodowski v. State, 196 Wis. 265, 280 N.W. 260 (1928).

In 1984, the court applied the rule in State v. Cleveland, 118 Wis. 2d 615, 348 N.W.2d 512 (1982), and in 1992, the court further discussed the rule and its non-blanket exceptions in State v. Williams, 168 Wis. 2d 970, 465 N.W.2d 42 (1992).

The Stevens decision, like the Arkansas court's opinion in State v. Wilson, 317 Ark. 548, 878 S.W.2d 755, 758 (1994), seemed to be based at least in part on the proposition that such rule was mere common law and not constitutional in force. Stevens, 181 Wis. 2d at 421. ["The Supreme Court has not, however, determined whether the rule of announcement is a constitutional requirement."] The Arkansas court had based its denial of Wilson's appeal on the proposition, "There is no

authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment." 317 Ark. 548, 878 S.W.2d 755, 758 (1994).

In fact, although there was then difference of opinion on this point among the commentators[1], the earlier case of Ker v. California, 374 U.S. 23 (1963) lacked a majority finding that the rule formed a part of the Fourth Amendment. Wilson established beyond dispute that although such rule had an English common-law heritage, the founders were clearly aware of the rule; thus follows a presumption in favor of announcement which is incorporated into the Fourth Amendment. 115 S. Ct. at 1917-18

In Wisconsin, there was hope that after the Supreme Court reversed Wilson that the Wisconsin supreme court would change course on Stevens. The case at bar provided such an occasion, however, the Wisconsin supreme court unfortunately decided not to avail itself of this opportunity.

Announcement is thus constitutionally presumed. "Certain" rather than "general" circumstances justify departure from the rule: Wilson listed "certain circumstances" under which the presumption could be overcome. 115 S. Ct. at 1918-19:

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[1] See e.g. Garcia, The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception, 93 Colum. L.Rev. 685 (1993).

> [T]he courts continued to recognize that under certain circumstances the presumption in favor of announcement necessarily would give way to contrary considerations...[C]ourts acknowledged that the presumption in favor of announcement would yield under circumstances presenting a threat of physical violence... Similarly, courts held that an officer may dispense with announcement in cases where a prisoner escapes from him and retreats to his dwelling...Finally, courts have indicated that unannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given...We need not attempt a catalogue of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.

The Wisconsin supreme court has chosen to ignore the traditional exceptions to the announcement rule as guidelines in determining when police may dispense with announcement. Rather than pay attention to the presence or absence of certain circumstances per the language of Wilson, the Wisconsin court has determined that the general circumstance of being a case about drug dealing is enough to overcome the presumption.

THE COURT SHOULD GRANT CERTIORARI TO ESTABLISH UNIFORMITY OF THE LAW ON THE VALIDITY OF BLANKET EXCEPTIONS TO THE ANNOUNCEMENT RULE BECAUSE PRESENTLY WISCONSIN IS ALONE AMIDST STATE COURTS OF FINAL RESORT ADOPTING A BLANKET EXCEPTION AFTER WILSON AND NO CIRCUIT OF THE FEDERAL COURTS OF APPEALS HAS RECOGNIZED SUCH AN EXCEPTION.

The Court ought to grant certiorari due to a need for a uniform rule on this point. See Commissioner v. Bilder, 369 U.S. 499, 501 (1962). Wisconsin, as will be shown, is alone amidst state courts of final resort to

adopt a blanket rule after Wilson.[2]

While a mid-level appellate court in Oregon reversed a conviction on hearsay grounds entirely unrelated to the entry, it stated in dicta:

> The characteristics of controlled substances are such that they could easily be destroyed if the officers had been required to undergo a prolonged wait after their announcement. That is a circumstance in this case that justifies the reasonableness of a forced entry after waiting only four seconds.

State v. Ordonez-Villanueva, 138 Or. App. 236, 908 P.2 333 (1995). The Oregon court approved a no-knock entry to execute a search warrant for controlled substances, finding such entry was reasonable under Wilson. In that case, an informant had previously seen controlled substances which might be easily destroyed if police complied with the knock-and-announce rule.

The following state courts declined to adopt a blanket rule after Wilson:

Robinette v. Carlisle, ____ S.W.2d ____ (Docket No.

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[2] Prior to Wilson, courts adopted blanket rules regarding entries for drug searches in People v. Lujan, 484 P.2d 1238, 1241 (Colo. 1971); Henson v. State, 204 A.2d 516, 519-20 (Md. 1964); and State v. Meyer, 311 N.W.2d 520, 524 (Neb. 1981). All three jurisdictions did so under the mistaken belief that knock and announce was not a part of the Fourth Amendment. It does not appear that any of the three courts above have revised their position since the issuance of Wilson.

Although it has been argued that other jurisdictions have found blanket rules, such an argument is without support. See State v. Stevens, 181 Wis. 2d 410, 438, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring).

2-96-074-CV, Texas App. June 27, 1996) (specific factual analysis conducted); State v. Moore, 535 N.W.2d 417 (Neb. Ct. App. 1995) (no- knock entry to execute search warrant on drug dealer's premises unreasonable under Wilson. Because a large amount of marijuana was to be seized, the police believed it would be difficult to destroy the drugs rapidly. Further, there was no evidence that the suspect was armed or dangerous); State v. Vargas, 910 P.2d 950 (N.M. Ct. App. 1995) (Holding reasonable a no-knock entry to arrest drug suspects pursuant to warrant. Suspicion that defendants traffic in drugs and possess weapons does not by itself excuse compliance with knock and announce. A review of the particular circumstances in the record revealed evidence of defendants' violent tendencies and established reasonableness of a no-knock entry); State v. Mastracchio, 672 A.2d 438, 443 (R.I. 1996) (The court remanded to the circuit court the issue of whether unannounced entry was reasonable because, although the government said such entry was justified to preserve officer safety and to prevent destruction of evidence, the circuit court had not made adequate findings of fact or reached a determination that this entry was reasonable under the circumstances); Hargrave v. Commonwealth, 464 S.E.2d 176, 179 (Va. Ct. App. 1995),

> [T]he courts have attempted to balance the purpose of the knock and announce rule and the

> needs of law enforcement by requiring that police have probable cause to believe an unannounced entry is necessary to prevent the destruction of evidence.

State v. Knight, 459 S.E.2d 481, 489 (N.C. 1995),

> A careful review of the record reveals that in the instant case...exigent circumstances existed justifying the forced entry of the Winston-Salem police officers into the defendant's residence after notification and a brief delay.

Thus, there was fact-specific analysis, not application of a blanket rule.

In Commonwealth v. Warnum, 656 N.E.2d 579, 581 (Mass. 1995), rather than find that Wilson justified a blanket rule, the court conducted this analysis: "In the special circumstances of this case, the objectives of the rule were substantially achieved." The Massachusetts court further found that the readily-disposable nature of drugs alone is not an exigent circumstance -- a court must look to the facts surrounding the entry. State v. Schimpf, 914 P.2d 1206, 1208 (Wash. App. 1996). The court looked to the particular facts of the case, but determined that there was no home entry, because the entry was to a backyard.

Further, no circuit of the federal courts of appeals has adopted a blanket rule in this area. The opinion of the Ninth Circuit of the Federal Court of Appeals in United States v. Ramirez, 91 F.3d 1297 (9th Cir. 1996) demonstrates this point:

> We also found no exigency where all the police

had was a generalized concern about drug dealers. See United States v. Moreno, 701 F.2d 815, 817-18 (9th Cir. 1983), vacated on other grounds, 469 U.S. 913 (1984).

The same sort of generalized unspecified concerns proved insufficient in United States v. Becker, 23 F.3d 1537, 1541 (9th Cir. 1994). But see Judge Kozinski's dissent in Ramirez, 91 F.3d 1297 at ____, stating:

> The majority opens up a square conflict with United States v. Turner, 926 F.2d 883 (9th Cir. 1991), cert. denied, 502 U.S. 830... a case where we upheld a no-knock entry.

The statement in Ramirez relating to "generalized concern about drug dealers" was dicta, therefore the conflict, if any, within the Ninth circuit does not directly relate to the rejection of a blanket rule for drug cases. As of this writing, the undersigned is unaware of whether the government will seek an en banc review in Ramirez. Even so, the Court should not hold the Ninth Circuit situation as a reason to hold off on granting certiorari in the present case because the issue of possible internal conflict does not turn on the rejection of a blanket rule.

In the Fourth Circuit, the court found that a generalized fear of destruction of evidence was insufficient to justify suspending the rule. Bonner v. Anderson, 81 F.3d 472, 475 (4th Cir. 1996). Denying a police officer defendant's interlocutory appeal of a denial of summary judgment in a civil suit, the Fourth

circuit judges all agreed, including the dissenting judge (81 F.3d at 476-7), that a case-by-case determination needs to occur. This re-affirmed the court's prior holding in United States v. Kennedy, 32 F.3d 876, 882 (4th Cir. 1994).

The Fifth Circuit found in United States v. Fike, 82 F.3d 1315, 1324 (5th Cir. 1996), that if an unannounced entry is made, the government bears the burden to justify the departure, but the court did not actually reach the question of whether there was justification, finding as a matter of fact, that no breaking had occurred. It can be inferred, however, from the opinion, that the Fifth circuit would require specificity of circumstances.

The Eighth Circuit held in United States v. Murphy, 69 F.3d 237, 242-43 (8th Cir. 1995), cert. denied, 116 S. Ct. 1032 (1996), that an entry in order to execute a search warrant on drug manufacturer's premises was reasonable under Wilson, finding that "particular facts regarding the premises to be searched" and "circumstances surrounding the execution of the warrant" established exigent circumstances. In the Murphy case, police had been informed prior to the search that the defendant carried a weapon on occasion, that weapons were present on the premises, that the defendant had a violent past and that he was on parole for second-degree murder.

The First Circuit in United States v. Jewell, 60

F.3d 20, 23-24 (1st Cir. 1995) ruled that Wilson requires a determination of whether an affidavit presented in support of an application for a no-knock warrant describes circumstances establishing that a unannounced entry would be reasonable.

The Sixth Circuit rejected a blanket rule in United States v. Bates, 84 F.3d 790 (6th Cir. 1996). For a discussion of the status of Bates, please see infra., page 5. The court examined the specific circumstances of the case, i.e., an informant's report of the presence of a handgun, the fear that cocaine would be destroyed, and the barricading of the apartment door. The panel found that these factors taken together did not constitute exigent circumstances.

The Third Circuit in Bodine v. Warwick, 72 F.3d 393, 398 (3rd Cir. 1995), interpreted Wilson as requiring a demonstration of particularity of circumstances.

Even prior to Wilson, in the Tenth Circuit, the court in United States v. Stewart, 867 F.2d 581 (10th Cir. 1989) found that where the government could not provide specific facts to demonstrate exigent circumstances, suppression for failure to comply with the rule was upheld. Such holding appears only strengthened by Wilson; see United States v. Smith, 63 F.3d 956 (10th Cir. 1995). The Second, Seventh and District of Columbia Circuits do not appear to have issued opinions as of this

writing interpreting Wilson.

Further, certiorari should be granted because there are no adequate and independent state grounds supporting the lower court opinion. The law of the state of Wisconsin regarding Fourth Amendment issues is interwoven with federal law and the adequacy of any possible state law grounds is not clear from the face of the opinion. See Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). In any case, independent state grounds cannot be pled where a violation of the federal constitution is involved.

Wisconsin Constitution Art. I, sec. 11 reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Punctuation aside, this language is identical to the Fourth Amendment with the exception that the Fourth Amendment uses "warrants" in the plural.

While the Wisconsin supreme court may interpret Wis. Const. art. I, § 11 more strictly than the United States Supreme Court interprets the Fourth Amendment, the Wisconsin court has consistently and routinely conformed the law of search and seizure under the Wisconsin Constitution to the law developed by the United States Supreme Court under the Fourth Amendment. State v. Williams, 168 Wis. 2d 970, 981, 485 N.W.2d 42 (1992).

Lastly, the Court should grant certiorari to avoid needless citizen and officer deaths. Innocent people will die as a result of the lower court decision. See State v. Richards, 201 Wis. 2d 839, 870, fn. 12, 549 N.W.2d 218 (1996) (Abrahamson, J. concurring). No-knock entries raise the risk of officers being shot by law-abiding residents who do not realize that those invading the home are police. Id. Householders will be killed, too. See Bovard, Oops, You're Dead: The Body Count from No-Knock Drug Raids is Climbing. Are You Next? Playboy 50-51 (Dec. 1994).

CONCLUSION

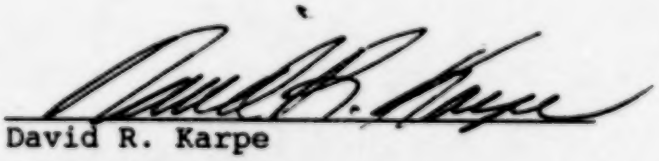
In Wilson, the United States Supreme Court said that compliance with the announcement rule must form a part of Fourth Amendment reasonableness analysis. The Wisconsin Supreme Court, in the case at bar, found that a blanket exception is acceptable in felony drug cases. The effect of such an exception is widespread, and the law is in great need of clarification as to what reasonableness requires: does the requirement of particularity compel a case-by-case analysis, or is a general finding "this is a drug case, therefore compliance is never necessary" acceptable? Need a court ask only two questions about police entry into a home: 1. Was there a warrant? 2. Is this a drug case? Does this satisfy the reasonableness requirement?

The lower court opinion conflicts with the Wilson decision in not requiring particularity of circumstances to justify unannounced entry. In effect, if the announcement rule forms part of the Fourth Amendment, particularity should be required.

Further, there is a need for uniformity in the law due to the confusion that ensues as to whether a balancing need occur in drug cases.

In order to answer these questions for courts throughout the nation, the petition for a writ of certiorari should be granted. Officer and householder safety requires the grant of certiorari.

Respectfully submitted,



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Attorney for Petitioner

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1995

STEINEY J. RICHARDS, PETITIONER

VS.

THE STATE OF WISCONSIN, RESPONDENT.

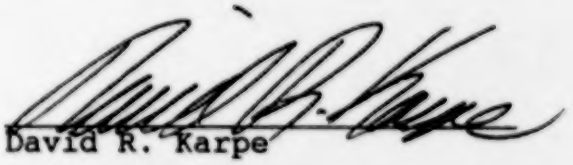
ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN

PROOF OF SERVICE

I, David R. Karpe, counsel of record for petitioner, swear that on this date, September 10, 1996, as required by Supreme Court Rule 29, I have served the enclosed MOTION TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding and that party's counsel, and on every person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid.

The names and addresses of those served are:

James E. Doyle, Attorney General
Stephen W. Kleinmaier, Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, Wisconsin 53707



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APPENDIX A

NOTICE
This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 93-0391-CR

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

v.

Steiney J. Richards,

Defendant-Appellant-Petitioner.

FILED

JUNE 12, 1996

Marilyn L. Graves
Clerk of Supreme Court
Madison, WI

REVIEW of a decision of the Court of Appeals. *Affirmed.*

WILLIAM A. BABLITCH, J. Steiney J. Richards (Richards) seeks review of a decision of the court of appeals affirming his conviction for possession of cocaine base with the intent to deliver. Richards argues that because the police failed to "knock and announce" prior to entering his motel room to execute a search warrant, any evidence seized must be suppressed. The issue is simply stated: whether the Fourth Amendment allows a blanket exception to the general requirement of "knock and announce" (the rule of announcement) for entries into premises pursuant to a search warrant for evidence of felonious drug delivery. We conclude that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery: an

extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police.[1] The public interests inherent in these circumstances far outweigh the minimal privacy interests of the occupants of the dwelling for which a search warrant has already been issued. Accordingly, we re-affirm State v. Stevens, 181 Wis. 2d 410, 511 N.W.2d 591 (1994), cert. denied, 115 S. Ct. 2245 (1995), and conclude that police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery.[2]

As a prefatory note, we took this case to examine the continuing validity of Stevens in light of the recently decided U.S. Supreme Court case of Wilson v. Arkansas, 115 S. Ct. 1914 (1995). We conclude that Stevens remains valid. In Stevens, this court adopted a blanket exception to the rule of announcement in cases involving a search warrant for felonious drug delivery.

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[1] The concurrence's position would, in many instances, place the police in situations of great personal risk. It makes neither good law nor good sense. Despite the overwhelming evidence across the country of the inherent dangerousness of these situations, the concurrence would deny the police the right to forego "knock and announce" unless the police had specific information about the dangerousness of the drug house to be searched and specific information about the dangerousness posed by its occupants. Thus, in those cases in which such specific information is unavailable, the concurrence would force the police into the untenable position of subjecting themselves to extremely high risks detailed in this opinion. We decline to follow the concurrence's invitation.

[2] We use the phrase "felonious drug delivery" to mean felonious delivery of drugs or felonious possession with intent to deliver drugs in violation of Subchapter IV, Wis. Stat. §§ 161.41, 161.42 and 161.43.

Wilson, decided subsequently to Stevens, held that the rule of announcement forms part of the Fourth Amendment reasonableness inquiry. The Court in Wilson left it to the lower courts to determine the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We proceed to do so now.

The dispositive facts for purposes of this appeal can be stated succinctly: on December 31, 1991, police executed a search warrant for the motel room of the defendant seeking evidence of the felonious crime of Possession with Intent to Deliver a Controlled Substance in violation of Wis. Stat. § 161.41 (1m)(1991-92).[3] They did not knock and announce prior to their entry. Drugs were seized.

The circuit court denied Richards' motion to suppress. Richards subsequently entered pleas of no contest to the felony of possession of cocaine base with the intent to deliver, Wis. Stat. § 161.41(1m), and a tax stamp violation, Wis. Stat. § 139.95(2).[4]

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[3] All future statutory references will be to the 1991-92 volume unless otherwise indicated. Wis. Stat. § 161.41(1m) provides in relevant part:

> (1m) Except as authorized by this chapter, it is unlawful for any person to possess, with intent to manufacture or deliver, a controlled substance.

[4] Wisconsin Stat. § 139.95(2) states, in relevant part:

> (2) A dealer who possesses a schedule I controlled substance or schedule II controlled substance that does not

(continued...)

The court found him guilty and sentenced him to 13 years imprisonment on the possession with intent count and three years concurrent imprisonment on the tax stamp count. Richards appealed. The court of appeals upheld the circuit court's ruling, relying on Stevens. Richards filed a petition for review which we granted.

The sole issue before this court is whether the Fourth Amendment to the United States Constitution[5] allows a blanket exception to the general requirement of "knock and announce" for entries into premises pursuant to a search warrant for evidence of felonious drug delivery. This is a question of law that we review without deference to the lower courts. State v. Betterley, 191 Wis. 2d 406, 416-17, 529 N.W. 2d 216 (1995).

Richards summarizes the issue in one sentence: "The blanket 'drug house' exception to the 'knock and announce' rule violates the Fourth Amendment's reasonableness requirement." Richards contends that the U.S. Supreme Court decision in Wilson forbids

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[4](...continued)

> bear evidence that the tax under s. 139.88 has been paid may be fined not more than $10,000 or imprisoned for not more than 5 years or both.

[5] Amendment IV of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

blanket rules regarding search and seizure because the reasonableness of each search must be examined on a case-by-case basis. The State of Wisconsin (State) argues that Wilson does not forbid blanket rules and, under Wilson, the blanket rule announced in Stevens is still valid. We agree with the State.

The Fourth Amendment to the United States Constitution and Wisconsin Constitution art. I, § 11 protect the security of people "in their persons, houses, papers, and effects against unreasonable searches and seizures." While this court may interpret Wis. Const. art. I, § 11 more strictly than the United States Supreme Court interprets the Fourth Amendment, it has consistently and routinely conformed the law of search and seizure under the Wisconsin Constitution to the law developed by the United States Supreme Court under the Fourth Amendment. State v. Williams, 168 Wis. 2d 970, 981, 485 N.W. 2d 42 (1992); see State v. Guzman, 166 Wis. 2d 577, 586-87, 480 N.W.2d 446 (1992).

The Fourth Amendment proscription against unreasonable searches and seizures not only requires that there be probable cause to undertake the search or make the seizure but also that the search or seizure be conducted in a reasonable manner. Tennessee v. Garner, 471 U.S. 1, 7-8 (1985). The rule of announcement, which requires police officers seeking to enter a dwelling in the execution of a search warrant to announce their identity and allow time for the door to be opened voluntarily, addresses the manner in which a legitimate governmental intrusion is to take place.

Williams, 168 Wis. 2d at 981. The rule of announcement has a common law heritage and serves three primary justifications: (1) protecting the individual's privacy in the home; (2) decreasing the potential for violence by alerting the resident that the officer is legitimately on the premises; and (3) preventing the physical destruction of property by giving the resident the opportunity to admit the officer voluntarily. Id. at 981-82. Under certain circumstances, a search is reasonable under the Fourth Amendment even if the police dispense with the rule of announcement and execute a no-knock entry. Wilson, 115 S. Ct. at 1918-19; see also Stevens, 181 Wis. 2d at 423. The knock and announce rule may be excused if "exigent circumstances" exist to justify the no-knock entry. United States v. Singer, 943 F.2d 758, 762 (7th Cir. 1991). Exigent circumstances "'include a reasonable belief that announcement of police presence would endanger the safety of the police or others, or a reasonable belief that unannounced entry is required to prevent the destruction of evidence.'" Williams, 168 Wis. 2d at 982 (citations omitted).

These "exigent circumstances" formed the basis of our decision in State v. Stevens. In Stevens, we held that when the police have a search warrant, supported by probable cause, to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs, they necessarily have reasonable cause to believe exigent circumstances exist. Stevens, 181 Wis. 2d at 424-25. We reasoned that the rationale behind the

rule of announcement was no longer valid in today's drug culture. "In fact, by announcing their presence, police may actually increase the likelihood for violence." Id. at 428. When the police execute a search warrant for evidence of drug delivery, there is reasonable cause to believe both that drugs will be destroyed and evidence lost, and that the occupants of the residence will be armed. Id. at 432. Therefore, a no-knock search is reasonable any time the police have a warrant, supported by probable cause, to search a residence for "evidence of drug dealing." Id. The limited privacy interests of the individual were balanced against two other governmental interests: the public's substantial interest in stopping or at least curtailing the drug trade and its related crimes, and the police officers' interest in protecting themselves and others from harm. Id. This court concluded:

> When the police execute a search warrant for evidence of delivery of drugs or evidence of possession with intent to deliver, there is reasonable cause to believe both that the drugs will be destroyed and evidence lost and that the occupants of the residence will be armed . . . Even when the police dispense with the entire knock and announcement, the societal interest in stopping the drug trade, combined with the police officers' safety interest, outweigh the occupants' limited privacy interests.

Stevens, 181 Wis. 2d at 432.

Richards contends that the practical effect of Stevens is a flat rule which cannot be valid given the level of intrusion and the fact that too much discretion is allowed to police officers.

Richards argues that the blanket exception to the knock and announce rule is inconsistent with the U.S. Supreme Court's decision in Wilson.

In Wilson, the defendant challenged a police entry into her home pursuant to a search warrant authorizing a search for evidence of drugs and drug paraphernalia. The defendant's suppression motion alleged that the police violated the common law principle requiring them to knock and announce their presence and authority before entering. The U.S. Supreme Court held that whether the officers knock and announce their presence and authority before entering a dwelling as required by the common law "forms a part of the Fourth Amendment reasonableness inquiry." Id. at 1916. The Court, however, noted that not all unannounced entries are unreasonable. "[L]aw enforcement interests may also establish the reasonableness of an unannounced entry." Id. at 1919. The Court stated:

> This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. As even petitioner concedes, the common-law principle of announcement was never stated as an inflexible rule requiring announcement under all circumstances.

Id. at 1918. The Court recognized that under certain circumstances, the presumption in favor of announcement necessarily gives way to contrary considerations. These contrary considerations include the threat of physical harm to the police,

the pursuit of a recently escaped arrestee, or the belief that evidence will likely be destroyed. Id. The Court stated:

> We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.

Id. at 1919.

Richards argues that the blanket "drug house" exception to the knock and announce rule adopted by this court in Stevens is no longer viable in light of Wilson. Richards further contends that Wilson requires a reasonableness analysis to be performed for every unannounced search and seizure. We disagree.

In Stevens, this court did not announce a blanket rule doing away with the common law rule of announcement. Instead, we adopted a narrow exception to the general rule: when police have a search warrant to search a premises for evidence of felonious drug delivery, they do not have to knock and announce. When police have probable cause to support a search warrant for evidence of felonious drug delivery, the potential for dangerousness to the police and the potential for the destructibility of evidence is so great as to overcome the general rule. The very facts supporting probable cause to believe that drugs and drug dealers are present in a dwelling also lead to the reasonable belief that exigent circumstances exist. In sum, we conclude that exigent

circumstances are always present when a search warrant for evidence of felonious drug delivery is executed.[6]

Wilson does not forbid blanket rules; rather, it requires such rules to be supported by the standard of "reasonableness." The Court left it to the lower courts to determine "the circumstances under which an unannounced entry is reasonable under the Fourth Amendment." Wilson, 115 S. Ct. at 1919.

The reasonableness of a search generally turns on whether it was conducted pursuant to a valid warrant. U.S. v. U.S. District Court, 407 U.S. 297, 309-10, 314-15 (1972). In deciding whether a particular police practice is reasonable, the Court has repeatedly said that the importance of the public interests must be weighed against the nature of the intrusion upon Fourth Amendment rights. Maryland v. Buie, 494 U.S. 325, 332 (1990). The Court stated that

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[6] The State's brief argues extensively concerning the "level of justification" the Fourth Amendment requires before the police can legally make an unannounced entry to execute a search warrant for evidence of drug dealing. The State argues that the proper level of justification for a no-knock entry is a reasonable suspicion that an announcement would endanger the safety of the officers and/or occupants, or a reasonable suspicion that an announcement would result in the destruction of evidence.

We need not address what level of justification is necessary in this case. Here, we are dealing with the particular circumstances of a search warrant for evidence of felonious drug delivery. Our holding is based on the assumption that drug dealers will have weapons and pose a danger to officers, and that drug dealers will destroy evidence or at least attempt to destroy evidence after announcement by the police. Therefore, because exigent circumstances are always present, we do not address the issue concerning what level of justification is needed for a no-knock entry. This issue must be left to a case in which drugs are not involved.

the balancing of these competing interests is "'the key principle of the Fourth Amendment.'" Gardner, 471 U.S. at 8 (citation omitted).

We balance these competing interests by looking first to the public interests involved when police execute a search warrant for felonious drug delivery. Law enforcement officers have a substantial interest in being able to secure the site so that it may be searched promptly, efficiently and safely. The success of police in searching for evidence and instrumentalities of drug dealing depends on their ability to establish command of the scene quickly and to secure the safety of themselves, the occupants and the place to be searched. Note, D. Allegro, Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant Is an Idea Whose Time Has Come, 64 Notre Dame L. Rev. 552, 553 (1989) [hereinafter Allegro].

Police officers face an unquantifiable risk of violence every time they go into a house to execute a search warrant.[7] The Court

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[7] The following represents only some of the recent newspaper articles documenting the escalating violence police face each day:

> A man was killed, and a Columbus police officer was slightly wounded last night during a drug raid. It was the second time this year that officers have been wounded in Near East Side Raids.

Erin Marie Medick, Man Slain, Swat Officer Wounded Shootings Came in Near East Side Raid, The Columbus Dispatch, Mar. 15, 1996.

(continued...)

[7](...continued)

> Designed to serve search warrants on crack houses, the Columbus Police Division's investigative and tactical unit is trained to enter homes where the risk of retaliation and gunfire is high. . . . The shooting occurred after police announced - as required by law - that they would be coming into the house, said Lt. William McKendry of the division's narcotics squad.

Alice Thomas, Drug Raids Becoming Riskier For Police, The Columbus Dispatch, Jan. 19, 1996.

> Interviews with police officers and a ballistics study will be used to determine who shot an Omaha police officer when police burst into a home to make an arrest Tuesday night, police said.

Angie Brunkow, Origin of Shot That Hit Officer Sought, The Omaha World-Herald, Mar. 1996.

> Police raided what they said was a family-run drug house early Saturday morning and then went into the drug business for a few hours. . . . Police confiscated 105 bags of heroin worth $2,600, about $5,000 worth of crack cocaine and six guns.

Karen Henderson, Raid-Sting at Drug House Leads to 10 Arrests, The Plain Dealer, Feb. 12, 1996.

> At least seven kinds of illegal drugs worth about $50,000, four guns and $36,500 in cash were seized by police when they raided a Spring Township house Wednesday morning, according to officials. . . . "This is the kind of thing we're used to finding, this and a lot more," he said, gesturing to an illegal sawed-off 12-gauge shotgun and a TEC-DC9 9mm semiautomatic pistol with a 30-bullet clip.

Steven Reinbrecht, Police Raid Spring Twp. House, Confiscate Drugs, Guns and Cash, Reading Eagle, Reading Times, Feb. 15, 1996.

> A SWAT team leading a force of more than 100 officers Wednesday raided an apartment building that police said had been turned into a fortress by drug dealers. . . . "There were armed guards at all entrances to the building, armed internal patrols 24 hours a day.

(continued...)

has recognized the unique danger police officers face in suspects' houses because the officers are coming onto their adversaries' "turf" which has a configuration unknown to the officers. In Maryland v. Buie, 494 U.S. 325 (1990), the Court acknowledged that:

> The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or road-side investigatory encounter. . . [A]n in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

Id. at 333.

As one commentator notes, the risk that police must face is greatly increased by a knock and announce requirement:

> [A] police officer making a high-risk warrant entry is at a severe disadvantage. When he announces authority and purpose he makes himself readily identifiable. The suspect, concealed inside a house, will generally be able to see the officer, or know where the officer is since he is most often near the door. Even if the officer can see occupants inside the house, he does not know if they intend to resist unless they are naive enough to reveal their violent intentions. The officers are most vulnerable when entering the house. If the announcement has given the [suspect] time to arm himself, all he needs to do is aim his firearm at the door and wait for a target to appear.

Allegro, at 566 (footnotes omitted).

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[7](...continued)
All the key players were in constant contact with each other with hand-held radios." . . . That drug dealers could control an entire building in a city like Racine shows that "the drug thing is all over the place," Higgins said. "It doesn't matter how big the city is. This is like a nest."

Ann Bothwell, SWAT Force Raids Racine Drug House, The Milwaukee Journal, Jan. 29, 1992.

These risks are only heightened when drugs are involved.[1] The connection between drugs and weapons has been well documented by appellate courts. Michigan v. Summers, 452 U.S. 692, 702 (1981); Stevens, 181 Wis. 2d at 420, 428-29; Williams, 168 Wis. 2d at 984-85; United States v. Kennedy, 32 F.3d 876, 882 (4th Cir. 1994) ("[T]he law has uniformly recognized that substantial dealers in narcotics possess firearms and that entrance into a situs of drug trafficking activity carries all too real dangers to law enforcement officers."); and State v. Harris, 384 S.E. 2d 50, 53 (N.C. App. 1989). The connection between drugs and weapons establishes that it is more than a possibility that guns will be found at the location that is the subject of a search warrant for drug dealing. Reporting on a study which concluded that drug dealers and gang members are the criminals most likely to use guns, an article in the New York Times noted:

> It is drug dealers, rather than drug users, who use guns, Professor Decker said, because they are usually carrying valuable quantities of drugs and large amounts of money and need the protection of a gun more than ordinary users.

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[1] Statistics indicate that drug related violence is a growing contributor to police mortality. From 1977 to 1986, of the police officers murdered, 6.5 percent, or 57 of 875, were killed in situations involving drug matters. In 1985, 7.6 percent of police murders were drug related, and in 1986, 10.6 percent of police murders involved drug matters. Federal Bureau of Investigation, Crime in the United States: Uniform Crime Reports (statistics extracted from annual reports from 1977-1986). See Allegro at 570, n.32.

Fox Butterfield, Study Discounts the Role of Drug Users in Gun-Related Crime, N.Y. Times, Oct. 8, 1995, at 36.

The study revealed that, among arrestees who admitted selling illegal drugs in the past year, 25 percent reported they carried a gun all or most of the time. Arrestees and Guns: Monitoring the Illegal Firearms Market, National Institute of Justice, Research Preview, September 1995. The results of this study show that the likelihood of finding guns during the execution of a search warrant for drug dealing is "more than a possibility." The 25 percent figure in the study relates only to arrestees; and among arrestees it reflects only the admitted use of guns. The use of guns by all drugs dealers is certainly higher than the use reflected in that study. Nevertheless, even using the 25 percent figure in the study, "requiring police to knock and announce their identity before executing all search warrants for drug dealing would be tantamount to requiring the police before each warrant execution to play Russian roulette with a four-chamber gun." (Respondent's brief at 23).

When suspects resist the police with firearms, officers face serious disadvantages.[9] Allegro, at 554. They are easily

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[9] Firearms claimed the lives of 92 percent of the officers killed in the line of duty from 1977 through 1986. Seventy percent of the murders were committed by the use of handguns, 13 percent by rifles, and 9 percent by shotguns. U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted 4 (1986).

(continued...)

identified by spoken commands and uniform, while assailants may be difficult or impossible for the officers to see. Id. An assailant may determine when and where to shoot, and if he has time to prepare to resist, it takes him only half a second to fire an accurate shot from a cocked gun. Id. The police officer must evaluate whether the situation justifies use of deadly force, typically requiring evaluation of a series of factors, and if his or her gun is holstered, it takes him or her one to 1.2 seconds to draw and return fire. Id. at 554-55.

When an officer confronts a suspect who has a firearm in hand, in 40 percent of the cases the suspect will fire, will usually fire first, and will often shoot with a ballistically superior weapon. R.J. Adams & T.M. McTernan, Street Survival: Tactics for Armed Encounters 35 (1980). Police shootings almost invariably occur at close range and are over almost instantly.[10] Allegro, at 555.

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[9](...continued)
Nationwide, an average of 17 of every 100 law enforcement officers were assaulted in 1986, an increase of 7 percent from 1985. During the year, 64,259 line-of-duty assaults were reported by 9,755 law enforcement agencies covering approximately 81 percent of the total United States population. These agencies employed a total of 380,249 officers. Id. at 41. Nearly 22,000 law enforcement officers were reported to have received personal injuries resulting from their assaults. Id.

[10] In almost half of the cases, the officer is five feet or less away. Of the more than 250 police officer murders in New York City from 1854 to 1980, the assailant was more than 20 feet away when he fired in only one case. See S. Chapman, Cops, Killers and Staying Alive: The Murder of Police Officers in America 21 (1986) (noting that from 1972-1984, 52.4 percent of officers murdered were zero to five feet from their assailants and 20.6 percent were six to ten feet away).

> In the vast majority of cases, the officer is ten feet or less from the assailant. Normally, the initial exchange of gunfire is determinative, with most confrontations over in two to three seconds with no more than a total of three shots fired. Almost half the time, an officer will face multiple assailants. While the assailants will fire without regard to bystanders, the officer must accommodate their presence.

Id. at 555 (footnotes omitted).

In Michigan v. Summers, 452 U.S. 692, 702-03 (1981), the Court recognized that the "risk of harm to both the police and the occupants [of an area subject to a search] is minimized if the officers routinely exercise unquestioned command of the situation." The sooner the officers have complete control of the situation, the less likely it is that any confrontation between suspects and officers will escalate to the point of gunfire. Minimizing this risk, in turn, ensures the safety not only of the officers, but also of suspects and of innocent bystanders.

All of this points to the need for officers to control the scene immediately, not only for their own safety and the safety of others, but also to seize evidence of felonious drug delivery. After all, a search warrant commands officers to go to a particular place to seize evidence of drugs and drug paraphernalia. In Stevens, we recognized that the "easily disposable nature of narcotics provides police with evidence sufficient to form a reasonable belief that no-knock entry is necessary to prevent the destruction of evidence." Stevens, 181 Wis. 2d at 425. If officers must knock and announce their authority and presence, they

provide the occupants of the house with the opportunity not only to arm themselves, but to dispose of the evidence involving drugs.

Allowing police to take command of the situation is thus vital to the safe and effective execution of a search warrant for evidence of felonious drug delivery. Moreover, the officers executing a search warrant are in the best position to decide how to take command of the situation. In some cases, police officers will undoubtedly decide that their safety, the safety of others, and the effective execution of the warrant dictate that they knock and announce; in other cases, they might decide that such a procedure would be counterproductive or even dangerous. "In cases like this, where the police have a valid warrant, supported by probable cause, to search a home for 'evidence of drug dealing,' the officers executing the warrant have the incentive to choose the safest method of entry." Stevens, 181 Wis. 2d at 430. It is constitutionally reasonable to allow officers in the field to decide what course of action to pursue instead of requiring them to "take unnecessary risks. . . ." Terry v. Ohio, 392 U.S. 1, 23-24 (1968); see also Graham v. Connor, 490 U.S. 386, 396-97 (1989) (stating that the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are often tense, uncertain, and rapidly evolving. . . .").

We now weigh these public interests of dangerousness and disposability against the individual's interest in having notice

that a search warrant is about to be executed in a few short seconds. Richards argues that he has privacy interests in keeping the police outside of his dwelling until the police "knock and announce." Although we acknowledge that privacy interests in the home are fundamental, we also conclude that these interests are not sufficient to elevate Richards' privacy interests over the public's interest in having police officers safely and effectively execute a search warrant for evidence of felonious drug delivery.

Richards' privacy interests are only slightly advanced by a knock and announce rule. Although Richards correctly notes that people normally have the highest expectation of privacy in their homes, this argument is largely irrelevant in this case. There is no dispute that within a matter of seconds after the police arrived with a search warrant, they were entitled to enter Richards' dwelling, with or without permission, and conduct as thorough a search as was reasonably necessary. The search had been authorized by a neutral magistrate, and would have occurred regardless of whether the police knocked and announced their presence.

> It is difficult to see, however, what actual protection is given to any right of privacy by the announcement rule. Once identity and purpose are stated, entry must always be permitted; if permission is denied, or even delayed for an inordinate amount of time, entry may be forced, provided the officer has a valid purpose in gaining admission. Since no discretion is vested in the occupant, in what manner does notice protect his privacy? . . .
>
> Thus balanced, the protections to privacy seem to be somewhat tenuous when compared to the potential for public harm. This is particularly true with respect to

> potential destruction of evidence, especially when one considers that the probable cause requirement would have to be met in any event.

Sonnenreich and Ebner, No-Knock and Nonsense, An Alleged Constitutional Problem, 44 St. John's L. Rev. 626, 647 (1970).

Here, the disruption of privacy interests is almost entirely attributable to the valid warrant, not the unannounced entry. "[W]here the police have a warrant to search the property, the residents retain only a very limited interest in privacy." Stevens, 181 Wis. 2d at 432. In Stevens, we stated that:

> Even under the rule of announcement, after the police have announced their identity and purpose, the occupants must let them in within a reasonable time or the police may force their way in. The occupants' privacy interests are limited to knowing the police are entering and perhaps effecting the method of entry. The occupants do not have the right to refuse entry.

Id.

When we compare these limited privacy interests to the substantial interest the public has in allowing the police to safely and effectively execute a search warrant, the balance overwhelmingly favors the public interest.

Police have widely regarded narcotics enforcement as a particularly dangerous area of police work for some time. However, beginning in the early 1980's, the hazards to police officers escalated. Street gangs, spawned by decay in America's cities, and already known for their propensity for irrational violence, entered

the drug business on a major scale.[11] In the 1960's and 1970's, the police confronted and adjusted to a higher level of violence.

When the risks of law enforcement change radically, the rules by which courts regulate the police should reflect those changes. Therefore, we conclude that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery. The public interests in these circumstances far outweigh the minimal privacy interests of the occupants of the

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[11] Street gangs have been documented in cities in the United States throughout most of the country's history, but accounts by the media, practitioners, and some researchers suggest that gangs are now posing a more serious crime problem than in the past. U.S. Department of Justice, National Institute of Justice, Street Gangs: Current Knowledge and Strategies 1 (1993). And while reports conflict about the extent to which gangs play an organized role in drug trafficking, recent research suggests that gang members are highly visible in the drug trade. Id.

In addition, it is easy for gang members to obtain weapons.

> It's real easy (for teenagers to get guns). You just have to have the money, and know somebody who can get one. Most gang members have . . . it's probably related to a drug dealer. They contact the drug dealer and tell him, "I pay so much for a gun." He'll say "OK, I'll sell it to you." A .12 gauge sawed-off would run, like, about 50 to 90 bucks. Nobody really ever buys a gun over 50 unless its a fully-automatic. . . . One of the main interests when someone (a gang member) breaks into a house [is] to look for guns or money. Really the guns they want to look for.

Catherine H. Conly, Hearing Summary of the National Field Study on Gangs and Gang Violence in Dallas, Texas, Revised Draft Report (Washington D.C.: National Institute of Justice, December 1991), at 13.

dwelling for which a search warrant has already been issued. Accordingly, we re-affirm Stevens and conclude that police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery. The decision of the court of appeals is affirmed.

By the Court.—The decision of the court of appeals is affirmed.

SHIRLEY S. ABRAHAMSON, J. (*concurring*). On the basis of the facts found by the circuit court I conclude, as does the majority, that the entry executed against the defendant was reasonable under the Fourth Amendment. I write separately because I conclude that the majority's reaffirmation of the blanket exception to the knock-and-announce rule first decreed in State v. Stevens, 181 Wis. 2d 410, 511 N.W.2d 591 (1994), cert. denied, 115 S. Ct. 2245 (1995),[1] fails to satisfy the Fourth Amendment's reasonableness requirement delineated by the United States Supreme Court in Wilson v. Arkansas, 115 S. Ct. 1914, 1918 (1995).

Wilson made clear that there is a "presumption in favor of announcement," 115 S. Ct. at 1918, but that the "Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." 115 S. Ct. at 1918. Law enforcement interests--including the threat of physical harm to law enforcement officers or the existence of reason to believe that evidence would likely be destroyed if advance notice were given--may establish the

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[1] In Stevens, the court examined the facts of the case and concluded that they provided a reasonable basis for the law enforcement officers' unannounced entry. The Stevens court then proceeded to create a blanket rule that law enforcement officers need never comply with the knock-and-announce rule when the police have probable cause through a search warrant for evidence of delivery of drugs or evidence of possession of drugs with intent to deliver. Stevens, 181 Wis. 2d at 435. The holding in Stevens jettisoned longstanding Wisconsin case law interpreting and applying the knock-and-announce rule.

reasonableness of an unannounced entry. Id. at 1919.[2] The burden is on the prosecution to show exigent circumstances excusing the no-knock entry. Id.

By reaffirming Stevens and declaring that neither findings of fact nor a determination of reasonableness are necessary in any case involving a search warrant of the premises of a drug dealer, today's majority opinion ignores the Court's instructions in Wilson. The majority also ignores the Court's "long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application" because "each case is to be decided on its own facts and circumstances." Ornelas v. United States, No. 95-5257, WL 276414 1996 at *5 (U.S. May 28, 1996) (quoting Ker v. California, 374 U.S. 23, 33 (1963)). Moreover, and also in contradiction to what Wilson teaches, the majority opinion's reasoning logically leads to the complete abandonment of the knock-and-announce rule in every case involving the execution of a search warrant.

I.

The blanket exception embraced by the majority today cannot be squared with the Wilson decision. Under Wilson, the courts rather than law enforcement officers are charged with determining whether

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[2] The Court held "that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." State v. Wilson, 115 S. Ct. 1914, 1919 (1995).

the facts and circumstances of a particular search comply with the Fourth Amendment's command that such a search be reasonable. Wilson, 115 S. Ct. at 1919.

The action taken by the Arkansas high court after the Wilson case was remanded from the United States Supreme Court provides an illustrative contrast with the action taken by the majority today. The Arkansas Supreme Court summarily remanded to the trial court even though the facts in Wilson provided significantly stronger grounds than are present in this case for recognizing an exigent circumstances exception to the knock-and-announce rule. In Wilson, evidence that the accused was a drug dealer included an actual purchase of drugs made by a police informant. Further, the accused had brandished a semi-automatic weapon while threatening to kill an informant if she worked for the police, while the accused's housemate had previously been convicted of arson and firebombing.

The Arkansas Supreme Court's reluctance to draw legal conclusions prior to the trial court's initial determination of whether a no-knock entry at issue was reasonable--despite strong evidence indicating that it was--contrasts sharply with this court's sweeping conclusion that all no-knock entries in cases involving drug dealers are, ipso facto, reasonable. Instead of "mak[ing] any necessary findings of fact and . . . mak[ing] the

determination of reasonableness" which Wilson requires,[3] the majority instead concludes that under current social conditions

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[3] Prior to executing the search warrant against the defendant in this case, the police knew that the defendant had previously been arrested for the possession of 63 packets of cocaine. Furthermore, after the defendant had checked out of another hotel, the police had found clear plastic sandwich bags like the ones used in packaging cocaine. Finally, information obtained from an informant demonstrated that the defendant and his companions had engaged in conduct that matched a drug courier profile, including paying in cash, refusing room service, and making and receiving numerous phone calls from their room.

While the circuit court found that these facts were sufficient to establish probable cause for a search warrant, it found them insufficient to justify a no-knock warrant and therefore rejected the request for a no-knock warrant.

When the police proceeded to execute the warrant, additional circumstances came into play. When the police first sought entry through a ruse, with one officer posing as a maintenance man, the defendant opened the door and then rapidly shut it again. The state and the defendant dispute whether the defendant recognized that the "maintenance man" was a police officer, as well as whether he saw the fully uniformed police officer standing to the right of the "maintenance man." The circuit court characterized the defendant's testimony as self-serving and apparently accepted the officers' statement of what had happened.

Under these circumstances, compliance with the knock-and-announce-rule would constitute a "useless gesture." It has long been recognized "that notice is not required when it is evident from the circumstances that the authority and purpose of the police is already known to those within the premises." 2 Wayne R. LaFave, Search and Seizure § 4.8(f), at 620 (3d ed. 1996) (collecting cases); see also State v. Berry, 174 Wis. 2d 28, 32, 496 N.W.2d 746 (Ct. App. 1993) (when law enforcement officers hold a "reasonable belief that compliance with the rule" of announcement "would be a useless gesture," they need not comply with it).

exigent circumstances are always present in the execution of search warrants involving felonious drug delivery.[4]

Had either the United States Supreme Court in Wilson or the Arkansas Supreme Court upon remand subscribed to a version of the blanket exception announced by the majority today, they need not have remanded for findings of fact and a determination of reasonableness, because there was no question but that the accused in Wilson was dealing drugs, owned a gun, and had threatened to use it. Both courts, however, declined the opportunity to announce blanket rule such as the rule embraced today by the majority.[5]27

Hence it is not surprising that federal and state courts (in addition to the Arkansas Supreme Court) which have had occasion to interpret and apply Wilson have also conducted fact-specific, case-by-case analyses in determining whether no-knock entries made in executing drug-related warrants had met the Fourth Amendment's

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[4] The majority might more appropriately have heeded Justice Scalia's recent reminder that the purpose of the Fourth Amendment requirement of reasonableness "is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted--even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" Minnesota v. Dickerson, 508 U.S. 366 (1993) (Scalia, J., concurring).

[5] According to the accused's reply brief in Wilson filed with the United States Supreme Court by the defendant, the state and all of the amici supporting the state's position sought a blanket rule exempting drug searches from the reach of the knock-and-announce rule. Reply Brief for Petitioner, Wilson v. Arkansas, No. 94-5707, 1995 WL 120155, at *11 (U.S. Mar. 17, 1955).

requirement of reasonableness.[6] The majority opinion cites no

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[6] See, e.g., United States v. Murphy, 69 F.3d 237, 242-43 (8th Cir. 1995), cert. denied, 116 S. Ct. 1032 (1996) (no-knock entry to execute search warrant on drug manufacturer's premises reasonable under Wilson; no-knock entries are reasonable when "particular facts regarding the premises to be searched" and "circumstances surrounding the execution of the warrant" establish exigent circumstances; police informed that accused sometimes carried a weapon, that weapons were on premises, that accused had a violent past and that accused was on parole from a second-degree murder conviction); State v. Wilson, 899 F. Supp. 521, 529 (Kan. 1995) (no-knock entry to execute search warrant for crack cocaine upheld; determination of reasonableness required by Wilson requires that "officers had particular reasons to believe that exigent circumstances existed"; "reasonableness inquiry focuses on what particular facts regarding the premises" were known to officers at the time); State v. Moore, 535 N.W.2d 417 (Neb. Ct. App. 1995) (no-knock entry to execute search warrant on drug dealer's premises unreasonable under Wilson; given amount of marijuana to be seized, police believed it would be difficult to destroy it quickly; no evidence that the suspect was armed or dangerous); State v. Vargas, 910 P.2d 950 (N.M. Ct. App. 1995) (no-knock entry to execute arrest warrant against drug traffickers was reasonable; while fact that defendants were suspected of trafficking in drugs and of possessing weapons is not itself enough to excuse compliance with rule of announcement, review of the record revealed additional evidence of defendants' violent tendencies and thereby established reasonableness of a no-knock entry); State v. Ordonez-Villanueva, 908 P.2d 333 (Or. Ct. App. 1995) (no-knock entry to execute search warrant for controlled substances reasonable under Wilson; informant had previously seen controlled substances which might be easily destroyed if police complied with the knock-and-announce rule); State v. Mastracchio, 672 A.2d 438, 443 (R.I. 1996) (question of whether no knock entry to execute search warrant on drug dealer's premises was reasonable remanded to circuit court; although state alleged that no-knock entry was justified to preserve officers' safety and prevent destruction of evidence, circuit court had not made the requisite factual findings and determination of reasonableness); Hargrave v. Commonwealth, 464 S.E.2d 176, 179 (Va. Ct. App. 1995) (no-knock entry to execute search warrant for drugs unreasonable under Wilson; although the object of the search was drugs, police did not have particularized suspicion that evidence could or would be readily destroyed).

See also United States v. Jewell, 60 F.3d 20, 23-24 (1st Cir. 1995) (Wilson requires a determination of whether an affidavit

(continued...)

cases--and I have found none--supporting its interpretation of Wilson.

Finally, the majority cites no United States Supreme Court case eliminating the requirement that officers be able to point to specific, articulable and individualized facts justifying their actions in each case. None of the cases cited by the majority relieves the state in Fourth Amendment cases from the requirement that officers' actions in a particular case be subject to meaningful judicial review to determine whether their actions are "objectively reasonable." See, e.g., Terry v. Ohio, 392 U.S. 1, 21-22 (1968); Michigan v. Summers, 452 U.S. 692, 702-03 (1981); Graham v. Connor, 490 U.S. 386, 396-97 (1989). While I recognize that "[t]he calculus of reasonableness must embody allowances for the fact that police officers are often forced to make split-second judgments," Graham, 490 U.S. at 397, it nevertheless is crucial that those judgments be assessed according to an "objective standard" by a detached and neutral judge. Terry, 392 U.S. at 21-22.

In allowing law enforcement officers rather than the courts to make the ultimate determination of whether a particular search has

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[6](...continued)
presented in support of an application for a no-knock warrant describes circumstances establishing that a no-knock entry would be reasonable); United States v. Conley, 911 F. Supp. 169, 172 (W.D. Pa. 1995) ("based on the teachings in Wilson, the Court believes that the circumstances of each factual situation should be considered by the Court in determining whether the unannounced entry is unreasonable under the Fourth Amendment").

been conducted reasonably, the majority has ignored the United States Supreme Court's admonition that "[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. Terry v. Ohio, 392 U.S. 1, 21 (1968) (emphasis added).

II.

The majority opinion characterizes its blanket exception as "a narrow exception to the general rule" requiring a knock-and-announce entry, Majority op. at 9. The majority's reasoning, however, leads inexorably to the conclusion that the police need never knock and announce and that their decision is not reviewable. As a result, the exception the majority opinion sets forth swallows the rule of announcement.

According to the majority, "[p]olice officers face an unquantifiable risk of violence every time they go into a house to execute a search warrant." Majority op. at 11. I agree with this assessment. Forty-two percent of America's 96.4 million households have some kind of firearms. Twenty-four percent of the households have pistols, 27% have shotguns and 23% have rifles.[7] The federal

[7] Brief for Petitioner, Wilson v. Arkansas, No. 94-5707, 1995 WL 39036, at *42 n.49 (Ark. Jan. 24, 1995) (citing Statistical Abstract of the United States (1992), Tables 409 & 702.

Bureau of Alcohol, Tobacco and Firearms estimates that there are approximately 200 million firearms in the nation, about one per person.[1] As the majority opinion points out, firearms claimed the lives of 92% of the law enforcement officers killed in the line of duty between 1977 and 1986.

According to the reasoning of the majority, then, the large number of firearms in this country and the large percentage of deaths of officers caused by firearms would create a compelling need to eliminate the knock-and-announce rule in all search warrant entries; the probability that one or more of the occupants of any premises has access to a gun would, ipso facto, establish exigent circumstances making a no-knock entry reasonable.

Perhaps aware that its evidence pertaining to firearms proves far too much, the majority attempts to distinguish the dangers associated with executing search warrants related to drugs from the dangers accompanying the execution of any search warrant by claiming that the "risks are only heightened when drugs are involved." Majority op. at 13. However, the crime statistics cited by the majority do not support the contention that "drug related violence is a growing contributor to police mortality." Majority op. at 14 n.8.

As I set forth in my concurrence to Stevens, 181 Wis. 2d at 448 n.18, the total number of officers killed on duty declined from

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[1] See State v. Williams, 168 Wis. 2d 970, 992, 485 N.W.2d 42 (1992) (Abrahamson, J., concurring).

1978 to 1991, as did the number of officers killed in arrest situations involving drug-related matters. Fewer officers (9 officers/4.3 percent) were murdered as a consequence of drug-related violence from 1992-94 than in the periods from 1978-81, 1982-86, or 1987-91.[9] From 1978-94 about twice as many officers were killed in traffic pursuits or stops as were killed in arrest situations involving drug-related matters.[10] During the same years, more officers were killed while answering disturbance calls for family quarrels than were killed in arrest situations involving drug-related matters.[11] The one officer killed in Wisconsin in 1995 was answering a domestic disturbance call.

What I stated in my concurrence to Stevens remains true today: while the death or injury of even one law enforcement officer is one too many, the empirical evidence cited does not support the majority's rationale that executing search warrants in drug cases is more dangerous to officers than other activities. Stevens, 181

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[9] U.S. Dept. of Justice Hindelang Criminal Justice Research Center, 1994 Sourcebook of Criminal Justice Statistics at 357.

[10] The total number of law enforcement officers killed in traffic stops or pursuits was 184, while 94 were killed in disturbance calls for family quarrels and 91 were killed in arrest situations involving drug-related matters. During the period 1992-1994, 10 officers were killed in 1992 and 1993, respectively, and 9 were killed in 1994 while engaged in traffic pursuits or stops; during the same years, 3 officers were killed each year in arrest situations involving drug-related matters. Id.

[11] Id. The number and percentage of officers killed while handling or transporting prisoners in custody doubled between the period 1978-81 and 1987-91. Id.

Wis. 2d at 449 (Abrahamson, J., concurring). If anything, those statistics argue that if law enforcement officers may dispense with the knock-and-announce rule in drug-related cases, they should be able to dispense with it altogether. Conversely, what Wilson teaches is that law enforcement officers may not dispense with the rule of announcement unless they can establish, on a case-by-case basis, that exigent circumstances justify an exception to the rule of announcement and render a no-knock entry reasonable under the Fourth Amendment.

The majority opinion rests on the premise that a knock-and-announce rule increases the likelihood of violence against law enforcement officers. In those cases, a rule of reasonableness would enable the officers to enter without announcement. In many other instances, however, law enforcement officers may expose themselves and other individuals to unnecessary violence when they do not announce their presence.[12]

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[12] Both the brief federal experience with no-knock entries as well as numerous recent newspaper articles indicate the often lethal risks that no-knock entries can pose to both law enforcement officers and the individuals whose homes they enter.

As I explain in my concurrence to Stevens, 181 Wis. 2d at 447-48, a 1970 federal statute authorizing no-knock warrants was repealed only four years later, following numerous highly publicized no-knock raids in which terrified citizens, imagining that intruders were entering their homes, discovered instead that the "intruders" were law enforcement officers entering without notice. The statute, which was described by one senator as "an invitation to official lawlessness," provoked numerous newspaper articles recounting the details of various no-knock raids; more than 100 of them were reproduced in the Congressional Record. In (continued...)

Rather than affirming the sweeping blanket exception to the knock-and-announce rule first advanced in Stevens, I would heed the instructions of the Wilson Court and assess the reasonableness of the no-knock entry in this case on the basis of the facts

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[12](...continued)
Virginia, a woman who had previously been burglarized shot and killed a young officer who, executing a no-knock warrant, entered her bedroom in the middle of the night; in California, a father was shot through the head in his living room as he cradled his infant son. Both the woman and the man were innocent of any wrongdoing. See 119 Cong. Rec. 15,170-76 (1973) (collecting articles); 119 Cong. Rec. 23,242-58 (same); see also Charles Patrick Garcia, The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception, 93 Colum. L. Rev. 685, 704-05 (1993) (describing unfortunate incidents resulting from no-knock raids undertaken in accordance with the 1970 federal statute).

For more recent accounts of injuries to officers and innocent victims in no-knock drug entries, see, e.g., Alan Abrahamson, Nightmare of Shots in the Dark, L.A. Times, Dec. 12, 1992, at 1 (U.S. drug agents acting on bad tip fail to identify themselves before making forcible entry; occupant, who thinks he is being robbed, shoots and wounds agent and is himself shot in leg, arm, shoulder and lung; no drugs found); James Bovard, No-Knock Entries by Police Take Their Toll on Innocent, Christian Science Monitor, May 24, 1994, at 18 (no-knock drug raids are frequently mistakes; describes, inter alia, no-knock entry in Stockton, CA, in which a 63-year-old homeowner killed a police officer and was then himself killed, although no drugs were found); Hipolito R. Corella, Police Admit SWAT Team Raided Wrong Home, Arizona Daily Star, July 29, 1993, at B1 (police crash through window and detonate stun grenade in townhouse whose inhabitants included three children under five and 75-year-old woman; owner dialed 911 and was told by the dispatcher that "the masked men screaming orders at frightened members of his family were police officers"); Toni Locy, Police Admit Error, Apologize for Fatal Raid, Boston Globe, Mar. 27, 1994 at 1 (in a drug raid, police make no-knock entry in wrong apartment, chasing 75-year-old minister, who suffers a fatal heart attack as a result); Sam Stanton, Cops' Deadly Mistakes in All-Out War on Drugs, San Francisco Examiner, Feb. 7, 1993 (no-knock drug raids often executed against wrong house, "and the tension involved in facing the unknown can lead to trouble"; describes three incidents involving innocent victims of no-knock entries).

presented. The court's decision today ignores Wilson, dispenses with longstanding Fourth Amendment jurisprudence requiring the assessment of reasonableness in each particular case, and may place the very law enforcement officers it purports to protect in greater peril. We should have availed ourselves today of the opportunity to correct our mistake in Stevens. Instead we have compounded it.

For the reasons set forth, I concur in the judgment.

APPENDIX B

FILED

MAR 3 1994

CLERK OF COURT OF APPEALS
OF WISCONSIN

COURT OF APPEALS
DECISION
DATED AND RELEASED

March 3, 1994

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to § 808.10, STATS., within 30 days hereof, pursuant to RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-0391-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEINEY J. RICHARDS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

SUNDBY, J. In this warranted drug search and seizure case, defendant Steiney J. Richards relies on our decision in *State v. Stevens*, 173 Wis.2d 290, 496 N.W.2d 201 (Ct. App. 1992). Because the Wisconsin Supreme Court

reversed our decision, *State v. Stevens*, No. 92-1557-CR (Wis. Feb. 8, 1994), and created a "drug house" exception to the "knock and announce" rule which applies here, we affirm the judgment of conviction and the order denying Richards' motion to suppress evidence of drugs seized in the search of his motel room.

At 3:40 a.m. on December 31, 1991, police officers executed a warrant to search Richards' motel room. Richards does not claim that the police had failed to establish probable cause to obtain a warrant to search his room for drugs. The sole issue he raises is whether, when their attempt to gain entry through a ruse failed, the police were required to comply with the "knock and announce" rule.

In *Stevens*, the Wisconsin Supreme Court adopted a "blanket" "drug house" rule. *Stevens*, slip op. at 15. The court concluded that, "where the police have a warrant to search the property, the residents retain only a very limited interest in privacy. The warrant authorizes the police to enter the residence and search for evidence pursuant to the search warrant." *Id.* at 17. The court further explained that "the societal interest in stopping the drug trade, combined with the police officers' safety interest, outweigh[s] the occupants' limited privacy interests." *Id.* at 18. The *Stevens* court concluded that that privacy interest is protected by the probable cause requirement which must be met before a warrant may be issued to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs. *See id.* at 9-10. When that probable cause requirement is met, the police may

execute a warrant to search a private residence for drugs without first knocking and announcing their presence and purpose.

Under the "drug house" exception, the officers' search of Richards' motel room was reasonable and did not violate his limited right of privacy.

By the Court.--Judgment and order affirmed.

Not recommended for publication in the official reports.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
ROOM 538, POTTER STEWART U.S. COURTHOUSE
100 EAST FIFTH STREET
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

TELEPHONE
(513) 564-7000

July 17, 1996

RECEIVED
JUL 22 1996
Federal Public Defender's Office
Memphis, Tennessee

Joseph T. Townsend, Esq.
Office of the Federal Public Defender
Suite 410, 100 N. Main Building
100 N. Main
Memphis, TN 38103

Re: No. 95-5507
United States of America v. Rondell Bates

Dear Mr. Townsend:

This will advise you that the court will appreciate your filiing a response to the government's petition for rehearing in the matter noted above. In connection with your response to the first section of the government's argument, the court will find particularly helpful your comment on the recent decision of the Supreme Court of Wisconsin in *State v. Richards*, 549 N.W.2d 218 (1996)

Please file five copies of your response, which should not exceed ten pages in length, with this office not later than Monday, July 29, 1996.

Thanking you for your prompt attention to this request, I am

Very truly yours,

Leonard Green, Clerk

cc: Victor L. Ivy, Esq.
Joseph Douglas Wilson, Esq.

APPENDIX D

COURT OF APPEALS
DECISION
DATED AND RELEASED

June 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1940-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH L. LARSON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Kenneth L. Larson appeals from a judgment convicting him of possession with intent to deliver a Schedule I controlled substance contrary to § 161.41(1m), STATS. Violation of that statute is a felony because it is punishable by imprisonment in the Wisconsin state prisons. Sections 939.60, 161.41(1m)(a), STATS. He seeks review of an order denying his motion to suppress evidence the police seized in his home on May 27, 1992, on a search warrant. His motion

asserted that the warrant was invalid because it contained a "no-knock" provision but the affidavit supporting its issuance failed to relate circumstances showing reasonable cause to believe that the circumstances justified a no-knock entry.

Larson describes the issues as (1) whether a no-knock warrant, based only on generalized information about the tendencies of "drug dealers," is unconstitutional under a Fourth Amendment analysis; and (2) whether failure to knock-and-announce in the execution of a search warrant is unreasonable when the persons in the home are not suspected of a crime or of presenting a danger to the police, the only suspect was in custody and the only movement detected in the house was "nervous pacing" and not destruction of evidence.

We conclude that the "blanket rule" adopted in ***State v. Stevens***, 181 Wis.2d 410, 511 N.W.2d 591 (1994), authorizing a no-knock warrant under the circumstances present requires that we affirm. Because our Wisconsin Supreme Court reaffirmed ***State v. Stevens***, after re-examining it in light of ***Wilson v. Arkansas***, ___ U.S. ___, 115 S.Ct. 191 (1995), we conclude that the blanket rule established in ***Stevens*** remains the law of this state.

Following an evidentiary hearing on Larson's motion to suppress, the trial court found that the affidavit on which the no-knock search warrant was issued to search Larson's home stated in part, "It has been the experience of your affiant [police detective] that if given time drug dealers will either arm themselves and/or dispose of evidence of a drug crime. Based on this, your affiant asks that the warrant be authorized as a no-knock search warrant." Affiant stated he had received an anonymous tip that Larson was selling fifty to 100 pounds of marijuana and up to one-half pound of cocaine per week. The affiant also stated that when Larson had been arrested for possession of marijuana earlier

that day, he had in his possession $5,620 and a quantity of marijuana. The same day the police had searched trash taken from the terrace at his home, and it contained evidence of drug activity.

Relying on ***State v. Cleveland***, 118 Wis.2d 615, 348 N.W.2d 512 (1984), and ***State v. Williams***, 168 Wis.2d 970, 485 N.W.2d 42 (1992), the trial court ruled that the supporting affidavit did not justify a no-knock provision. The ***Cleveland*** court held that to justify a no-knock entry to prevent the destruction of evidence, the police cannot rely on a blanket rule for a no-knock entry based on the proposition that drugs are easily destroyed but must have particular grounds to provide them with reasonable cause to believe that drugs will be destroyed. ***Cleveland***, 118 Wis.2d at 628, 348 N.W.2d at 519. The ***Cleveland*** court added in dictum that a no-knock entry is not justified by the allegation that drug dealers in general are often armed. ***Id.*** at 631 n.16, 348 N.W.2d at 521. The ***Williams*** court held that the police have probable cause for a no-knock entry only when they have information that a person possesses both firearms and a large quantity of drugs. ***Williams***, 168 Wis.2d at 986, 485 N.W.2d at 48.

The trial court concluded that the no-knock provision was erroneously authorized, but sustained execution of the warrant on other grounds. The court found that when the officers gathered to execute the warrant about 3:00 a.m. on May 27, 1992, they had reason to believe that only Larson's wife and children occupied the premises. The officers decided that if they knocked and the wife answered the door, they would have secured the only adult present and they could then enter the premises to make the search. The court found the officers knocked but they did not announce that they were police with a search warrant.

The trial court found that while officers were knocking at the front door, an officer securing the rear area of the home saw a person silhouetted against a light in the house and pacing back

and forth. When he informed the officers at the front door that there was movement in the house, they used a ram to open the door. That occurred between twenty-five and thirty-five seconds after the knocking. The officer who decided to force the entry did so because of his concern over the movement in the house and the lack of response to the knocking. He wanted the police to control the situation and eliminate the likelihood of danger to them and the occupants and to prevent possible destruction of evidence.

The trial court concluded that the totality of the circumstances surrounding the entry established that the police acted reasonably in their entry of Larson's residence. The court said that the officers had attempted to comply with the rule of announcement, and the decision to force an entry was made after some thirty seconds elapsed after knocking and after they learned of movement in the house not directed to the front door. The court said at that point they had reason to believe that evidence was being destroyed. Concluding it was reasonable for the police not to further follow the rule of announcement, the court denied the motion to suppress.

Shortly after the trial court denied Larson's motion to suppress, the Wisconsin Supreme Court decided ***State v. Stevens***, 181 Wis.2d 410, 511 N.W.2d 591 (1994). The ***Stevens*** court overruled its prior decisions in ***Cleveland*** and ***Williams***, and established a "blanket rule" authorizing no-knock entry provisions for warrants to search homes for evidence of delivery of drugs or evidence of possession with intent to deliver drugs. ***Stevens***, 181 Wis.2d at 424-25, 511 N.W.2d at 595. The court held that because of the easy destruction of drugs and the consequent loss of evidence, the police need not establish that a certain quantity of drugs is in the home to be searched in order to effect a no-knock entry. ***Id.*** at 426-27, 511 N.W.2d at 596. The court also held that due to the inherent violence associated with drug

dealing, the police need not offer particularized evidence of weapons to demonstrate that exigent circumstances exist justifying a no-knock search of a home. *Id.* at 430, 511 N.W.2d at 596.

Larson contends that *Wilson v. Arkansas*, ___ U.S. ___, 115 S.Ct. 1914 (1995), requires us to re-examine the blanket rule established in *Stevens*, 181 Wis.2d at 424-25, 511 N.W.2d at 591. Indeed, he asserts that *Wilson* effectively overrules *Stevens*. However, the Wisconsin Supreme Court undertook in *State v. Richards*, No. 93-0391-CR (June 12, 1996), "to examine the continued validity of *Stevens* in light of ... *Wilson v. Arkansas* ...." *Richards*, slip op. at 2. The *Richards* court concluded "that *Stevens* remains valid," *id.*, reaffirmed *Stevens*, and concluded "that police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery."[1] *Richards*, slip op. at 22. Larson was convicted of felonious drug delivery. We conclude the issuance of the no-knock search warrant and its execution were proper.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[1] The Court defined "felonious drug delivery" to mean felonious delivery of drugs or felonious possession with intent to deliver drugs in violation of Subchapter IV, Wis. Stats., §§ 161.41-43. *Richards*, slip op at 2, n.2. Larson was convicted of violating § 161.41(1m), STATS.

QUESTIONS PRESENTED

1. Is reasonable suspicion or probable cause the level of justification that needs to be satisfied to render an unannounced home entry to execute a search warrant reasonable under the Fourth Amendment?

2. Does the ease with which drugs can be destroyed or the likelihood that drug dealers are armed satisfy the requisite level of justification (reasonable suspicion or probable cause) to authorize the police to make an unannounced entry to execute a search warrant for evidence of drug dealing, as that phrase is defined by the Wisconsin Supreme Court in State v. Richards, 549 N.W.2d 218, 219 n.2 (Wis. 1996), and State v. Stevens, 511 N.W.2d 591, 595 (Wis. 1994), cert. denied, 115 S. Ct. 2245 (1995)?

3. If the holding in Stevens does not establish that the police entry was reasonable in this case, was the entry reasonable because any further announcement by the police would have been a "useless gesture"?

4. If the entry to execute a search warrant was in violation of the Fourth Amendment, does the exclusionary rule require the suppression of evidence seized in the execution of the warrant?

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No. 96-5955

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

STEINEY RICHARDS,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The respondent agrees with the petitioner's Statement of the Case with the possible exception of two ambiguous statements. In addition, a more complete statement of the facts is necessary to understand why the petitioner would not obtain suppression of the evidence even if this Court found that the blanket rule approved by the Wisconsin Supreme Court is invalid.

At page 2 of the Petition for a Writ of Certiorari, the petitioner states: "The police did not comply with the announcement rule in effecting the entry." The respondent agrees that the police did not announce their purpose prior to entry. However, the respondent believes, and the Wisconsin Supreme Court found, that

the entry was in compliance with the approved exceptions to the rule of announcement.

At page 3 of the Petition for a Writ of Certiorari, the petitioner states: "The Wisconsin Supreme Court held that the particular circumstances of this case did not matter in light of the blanket exception to the announcement rule." That statement is not accurate. The circumstances in this case that provided the police and the magistrate with probable cause to believe that the defendant possessed controlled substances with intent to deliver also provided the police with the information necessary to show that announcement of identity and purpose prior to entry would present a threat of physical violence and create a likelihood that evidence would be destroyed. Therefore, the circumstances of this case were important because they were consistent with the experience of police in similar circumstances where there was a threat of violence and the destruction of evidence.

Additional facts must be considered because they would be relevant if this Court concluded that the blanket rule approved by the Wisconsin Supreme Court was invalid. The additional facts were set forth in the concurring opinion in State v. Richards, 549 N.W.2d 218, 228 (Wis. 1996):

> Prior to executing the search warrant against the defendant in this case, the police knew that the defendant had previously been arrested for the possession of 63 packets of cocaine. Furthermore, after the defendant had checked out of another hotel, the police had found clear plastic sandwich bags like the ones used in packaging cocaine. Finally, information obtained from an informant demonstrated that the defendant and his companions had engaged in conduct that matched a drug courier profile, including paying in cash, refusing room service, and making and receiving numerous phone calls from their room.

> While the circuit court found that these facts were sufficient to establish probable cause for a search warrant, it found them insufficient to justify a no-knock warrant and therefore rejected the request for a no-knock warrant.
>
> When the police proceeded to execute the warrant, additional circumstances came into play. When the police first sought entry through a ruse, with one officer posing as a maintenance man, the defendant opened the door and then rapidly shut it again. The state and the defendant dispute whether the defendant recognized that the "maintenance man" was a police officer, as well as whether he saw the fully uniformed police officer standing to the right of the "maintenance man." The circuit court characterized the defendant's testimony as self-serving and apparently accepted the officers' statement of what had happened.

After the defendant closed the door, the police heard the deadbolt being locked (42:16-17, 19). The police then forced open the door to gain entry to the motel room (42:17).

ARGUMENT

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR RESOLVING CONFLICTS AMONG COURTS BECAUSE RESOLUTION OF THE CONFLICT IS IRRELEVANT TO THE ULTIMATE OUTCOME OF THIS CASE.

The petitioner asks this Court to review the decision of the Wisconsin Supreme Court in State v. Richards, wherein the court reaffirmed the holding in State v. Stevens, 511 N.W.2d 591 (Wis. 1994), cert. denied, 115 S. Ct. 2245 (1995), and concluded

> that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery: an extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police. The public interests inherent in these circumstances far outweigh the minimal privacy interests of the occupants of the dwelling for which a search warrant has already been issued. Accordingly, we re-affirm State v. Stevens, 181 Wis.2d 410, 511 N.W.2d

591 (1994), cert. denied, ___ U.S. ___, 115 S.Ct. 2245, 132 L.Ed.2d 254 (1995), and conclude that police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery.

Richards, 549 N.W.2d at 219 (footnotes omitted).

The court explained that it used "the phrase 'felonious drug delivery' to mean delivery of drugs or felonious possession with intent to deliver drugs."[1] Richards, 549 N.W.2d at 219 n.2.

The petitioner states that the blanket rule stated in Richards is inconsistent with the holdings in other jurisdictions; and he asks this Court to grant certiorari to establish a uniform rule. Petition for a Writ of Certiorari at 13-14.

The petition is internally inconsistent. At page 6, the petition expresses a concern for the floodgates opening with courts following the holding in Richards, but at pages 13 to 14 the petition states that "Wisconsin . . . is alone amidst state courts of final resort to adopt a blanket rule after Wilson [v. Arkansas, 115 S. Ct. 1914 (1995)]." If Wisconsin is alone, apparently the petitioner's concern about the floodgates opening is unfounded.

To the extent there is a conflict among jurisdictions concerning the application of the rule of announcement in light of

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[1]The petitioner several times misstates the holding of the decision in Richards when he states that the decision permits unannounced entries in "drug cases." Petition for a Writ of Certiorari at 4 and 21. Also, in stating the "Questions Presented" in the petition, the petitioner incorrectly implies that the Wisconsin Supreme Court approved unannounced entries "if the police have a warrant to search for drugs" or "if drugs are the object of a search warrant." These questions obviously misstate the holding of the Wisconsin Supreme Court in Richards, 549 N.W.2d at 219 n.2, where the court carefully defined its terms to limit the holding to warrants for felonious delivery of drugs or felonious possession with intent to deliver drugs. Therefore, the holding in Richards does not apply to all "drug cases," as the petition implies.

the holding in Wilson v. Arkansas, 115 S. Ct. 1914 (1995), this case is not the appropriate vehicle for resolving the conflict because resolution of the conflict is irrelevant to the outcome of this case. Even if the law is defined in the way suggested by the petitioner, the police entry in this case was legal. The concurring justice in Richards agreed with the petitioner's interpretation of Wilson and the application of the rule of announcement; but the concurring justice concluded that the police entry was legal.

After describing the facts as reported at pages 2 to 3 of this response, Justice Abrahamson concluded:

> Under these circumstances, compliance with the knock-and-announce-rule would constitute a "useless gesture." It has long been recognized "that notice is not required when it is evident from the circumstances that the authority and purpose of the police is already known to those within the premises." 2 Wayne R. LaFave, Search and Seizure § 4.8(f), at 620 (3d ed. 1996) (collecting cases); see also State v. Berry, 174 Wis.2d 28, 32, 496 N.W.2d 746 (Ct.App.1993) (when law enforcement officers hold a "reasonable belief that compliance with the rule" of announcement "would be a useless gesture," they need not comply with it).

Richards, 549 N.W.2d at 228 n.3.

In this case, further announcement by the police would have been useless because, after seeing a police officer outside his door, the defendant slammed the door in the face of the police. Richards, 549 N.W.2d at 228 n.3. The actions of the defendant indicated that he knew why the police were present. In addition, the actions of the defendant in closing and locking the door provided reason for the police to believe that evidence would be destroyed or that the defendant would flee, thereby giving the

police justification to enter without further announcement. Wilson, 115 S. Ct. at 1919.

In other words, even if the conflicts in the law were resolved in the way suggested by the petitioner, the law would recognize that the police had particular information that provided a reason to believe that evidence would be destroyed or the defendant would flee if the police made a further announcement of identity and purpose before entering. Because the police had reason to believe that evidence would be destroyed or that the defendant would flee, the police were authorized to make the entry to execute the search warrant.

Therefore, even if the conflicts in the law were resolved in the manner suggested by the petitioner, the resolution of the conflicts would be irrelevant to the outcome of this case because the police would still be found to have legally entered the room and the evidence would be admissible.

Because resolution of the conflicts would be irrelevant to the outcome of this case, the Petition for a Writ of Certiorari should be denied. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, Supreme Court Practice, at 173 (7th ed. 1993).

II. THE HOLDINGS OF STEVENS AND RICHARDS DO NOT CONFLICT WITH THE DECISION OF THIS COURT IN WILSON.

The petition alleges that the holding in Richards conflicts with the holding in Wilson. Petition for a Writ of Certiorari at 4.

In Wilson, 115 S. Ct. at 1918, this Court held:

> Our own cases have acknowledged that the common-law principle of announcement is "embedded in Anglo-American law," Miller v. United States, 357 U.S. 301, 313, 78 S.Ct. 1190, 1198, 2 L.Ed.2d 1332 (1958), but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold. Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

(Footnote omitted.)

The Court recognized that in some circumstances unannounced entries would be reasonable; but the Court did not define those circumstances. Instead, the Court left it to lower federal courts and state courts to do so. Wilson, 115 S. Ct. at 1918-19. This Court explained in Wilson, 115 S. Ct. at 1919:

> We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.

In Richards and Stevens, the Wisconsin Supreme Court simply defined one of those circumstances where an unannounced entry to execute a search warrant is reasonable under the Fourth Amendment.

In Stevens, 511 N.W.2d at 595, the court adopted a blanket rule that, when the police have a search warrant, supported by probable cause, to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs, they

have reasonable cause to believe exigent circumstances exist; and, thus, in all such searches the police are justified in dispensing with the rule of announcement and making a no-knock entry.

In Richards, the Wisconsin Supreme Court reaffirmed the holding in Stevens and concluded

> that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery: an extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police. The public interests inherent in these circumstances far outweigh the minimal privacy interests of the occupants of the dwelling for which a search warrant has already been issued. Accordingly, we re-affirm State v. Stevens, 181 Wis.2d 410, 511 N.W.2d 591 (1994), ___ U.S. ___, cert. denied, 115 S.Ct. 2245, 132 L.Ed.2d 254 (1995), and conclude that police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery.

Richards, 549 N.W.2d at 219 (footnotes omitted).

The petition contends that the blanket rule approved in Stevens and reaffirmed in Richards is not permitted by Wilson. Petition for a Writ of Certiorari at 6-7.[2]

Blanket rules are not prohibited by the Fourth Amendment. This Court has recognized the validity and need for blanket rules in law enforcement. In Michigan v. Summers, 452 U.S. 692, 705 n.19 (1981), this Court acknowledged the validity of blanket rules when

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[2]The petition states that this Court in Wilson chose not to endorse a blanket rule. Petition for a Writ of Certiorari at 10. There is nothing in the Wilson opinion, however, addressing the question of blanket rules. Since the only question addressed in Wilson, 115 S. Ct. at 1916, was whether the common-law knock-and-announce principle formed a part of the Fourth Amendment reasonableness inquiry, it is not surprising that the opinion did not address the question of blanket rules.

it recognized the importance of deciding cases on categorical rather than ad hoc bases:

> As Justice WHITE noted in his concurrence in Dunaway, if police are to have workable rules, the balancing of the competing interests inherent in the Terry principle "must in large part be done on a categorical basis--not in an ad hoc, case-by-case fashion by individual police officers." 442 U.S., at 219-220, 99 S.Ct., at 2260.

In addition, in Colorado v. Bertine, 479 U.S. 367, 375 (1987), this Court recognized the need and usefulness of easy to apply standards:

> We reaffirm these principles here: "'[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'"

The blanket rules are proper where they are supported by the applicable level of justification. In Stevens, the Wisconsin Supreme Court concluded that its rule was so supported. The Wisconsin Supreme Court in Stevens, 511 N.W.2d at 595, concluded that where police have a warrant to search for evidence of drug dealing, "they necessarily have reasonable cause to believe exigent circumstances exist." See also Richards, 549 N.W.2d at 221, describing the holding in Stevens. In Richards, the court concluded that the rule was supported by the circumstances particular to drug dealing because experience established that drugs dealers probably will have weapons and probably will attempt to destroy evidence if the police announce their identity and purpose prior to entering. Richards, 549 N.W.2d at 222-25. Thus, the Wisconsin Supreme Court relied on the particular circumstances applicable to the evidence of drug dealing in Stevens and Richards.

The Wisconsin Supreme Court in those cases did not rely on some general circumstances unrelated to the facts of those cases as the petition accuses the court of doing. Petition for a Writ of Certiorari at 12-13.

Because the court in Richards relied on the facts applicable to drug dealers, including the dealer described in the search warrant, the issue is whether the facts of the case support the court's denial of the suppression motion. Such a sufficiency of the evidence issue does not merit review by this Court.[3]

III. CONCERNS FOR SAFETY SHOULD NOT BE A REASON FOR THIS COURT TO GRANT THE PETITION FOR A WRIT OF CERTIORARI.

The petitioner asks this Court to grant certiorari "to avoid needless citizen and officer deaths. Innocent people will die as a result of the lower court decision." Petition for a Writ of Certiorari at 21.

The petitioner's claim is contradicted by the opinions in Stevens and Richards. Both decisions recognize that the officers executing the search warrant have the "'incentive to choose the safest method of entry.'" Richards, 549 N.W.2d at 225, quoting Stevens, 511 N.W.2d at 597.

As discussed by the court in Richards, 549 N.W.2d at 222-28, the execution of search warrants is dangerous. The unannounced entry is frequently the safest because it enables the police "to

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[3]This case, which simply reaffirms the holding of State v. Stevens, does not merit review by this Court any more than did the decision in Stevens, a case in which this Court denied certiorari on May 30, 1995, just eight days after the Wilson case was decided. Stevens v. Wisconsin, 115 S. Ct. 2245 (1995).

establish command of the scene quickly and to secure the safety of themselves, the occupants and the place to be searched." Richards, 549 N.W.2d at 223. See also Stevens, 511 N.W.2d at 596-97.

The people best able to determine the safest method of entry in a particular case are the police who must make the entry. It cannot be said that granting the writ of certiorari in this case to reverse the decision of the Wisconsin Supreme Court will avoid citizen and officer deaths. If officers are prevented from making the safest entry, deaths may increase. The safest route for the courts is to do as the Wisconsin Supreme Court did in Stevens, 511 N.W.2d at 597, and "yield to the police officers' discretion in choosing whether or not to follow the rule of announcement" because the police have "the incentive to choose the safest method of entry."

IV. ADDITIONAL ISSUES SHOULD BE CONSIDERED IF THE COURT GRANTS THE PETITION FOR A WRIT OF CERTIORARI.

The petitioner requests this Court to grant the writ of certiorari to consider whether the decision in Richards conflicts with this Court's decision in Wilson.

If the Petition for a Writ of Certiorari is granted, the State of Wisconsin will ask the Court to consider the following additional issues: whether the level of justification the police must satisfy to make an unannounced entry is a reasonable suspicion or a probable cause test; whether the entry in this case was reasonable because further announcement after the defendant slammed and locked the door in the face of the police would have been a "useless gesture"; and whether the exclusionary rule requires the

suppression of evidence for a violation of the rule of announcement when the police are executing a valid search warrant. The State of Wisconsin will contend that under Murray v. United States, 487 U.S. 533 (1988), and Segura v. United States, 468 U.S. 796 (1984), the exclusionary rule should not be applied to evidence seized in the execution of a valid search warrant.

CONCLUSION

For the reasons discussed above, the State of Wisconsin, respondent, requests this Court to deny the Petition for a Writ of Certiorari.

Dated this 4th day of November, 1996.

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November 4, 1996

Mr. William K. Suter
Clerk
United States Supreme Court
One First Street NE
Washington, D.C. 20543

Re: Steiney Richards v. State of Wisconsin
Case No. 96-5955

Dear Mr. Suter:

Enclosed for filing by first class mail please find ten copies of the Brief in Opposition to Petition for a Writ of Certiorari. As evidenced by the enclosed affidavit of service, a copy of the brief has been served by mail today on counsel for petitioner.

Sincerely,

Stephen W. Kleinmaier

Stephen W. Kleinmaier
Assistant Attorney General
of Wisconsin

Attorney for Respondent

SWK:slp

Enclosures

c: David R. Karpe
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No. 96-5955

IN THE
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October Term, 1995

STEINEY RICHARDS,

Petitioner,

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STATE OF WISCONSIN,

Respondent.

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STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

SANDRA PIRK, being first duly sworn, on oath deposes and says that on the 4th day of November, 1996, she served the Brief in Opposition to Petition for a Writ of Certiorari by depositing a copy of the same in the United States mailbox, with first class postage prepaid to: David R. Karpe, Attorney at Law, Post Office Box 260218, Madison, WI 53726-0218

Sandra Pirk
Sandra Pirk

Subscribed and sworn to before me
this 4th day of November, 1996.

Adelia J. Carney
Notary Public, State of Wisconsin
My Commission: expires 10/17/99

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No. 96-5955

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1995

STEINEY J. RICHARDS, PETITIONER

VS.

THE STATE OF WISCONSIN, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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THE BRIEF IN OPPOSITION MISSTATES THE ISSUES BEFORE THE COURT. 1

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ARGUMENT

THE BRIEF IN OPPOSITION MISSTATES THE ISSUES BEFORE THE COURT.

In the "Questions Presented" section of its brief, the respondent raises only questions never reached by the Wisconsin supreme court in this case. The petitioner in no way agrees that the scope of the granting of certiorari ought to be expanded in this case. The Wisconsin supreme court opinion relegated its comments on respondent's first two "Questions Presented," to a footnote explaining that in a blanket rule case, the question of "probable cause" vs. "reasonable suspicion" had no relevance. State v. Richards, 201 Wis. 2d 839, 849, 549 N.W.2d 218, 222 n. 6 (1996) ("This issue must be left to a case in which drugs are not involved.").

The respondent raises "useless gesture" as a defense in its third "Question Presented." Again, the Wisconsin supreme court did not reach consideration of this doctrine in this case, and the case was not decided on that basis. The main opinion refers repeatedly to the fact that the Wisconsin supreme court decided this case on the basis of the blanket rule, therefore the majority of the court did not reach the question as to whether some other exception to the announcement requirement should apply. 201 Wis. 2d at 844, 849, 860, 549 N.W.2d at 220, 222, 227. Although there is a brief discussion of "useless gesture" in a footnote in the concurring opinion, 201 Wis. 2d at 864, 549 N.W.2d at 228, n. 3,

this principle simply does not apply under these facts because there is ambiguity over whether the petitioner knew those seeking admission were police and why they were there. The police here used a ruse to get the petitioner to open the door to his room: the officer who knocked on the door was masquerading as a maintenance man. The petitioner may or may not have seen a uniformed officer standing off to the side of the "maintenance man." Paramount to this analysis is that: the petitioner had no indication from the police of their purpose in coming to his door at 3:40 a.m. Under Miller v. United States, 357 U.S. 301, 309-310 (1958), for "useless gesture" to lie, the officer must be virtually certain that the person inside is already aware of the presence and purpose of the police prior to entry:

> The rule seems to require notice in the form of an express announcement by the officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case. It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture.

The respondent's fourth "Question Presented" is a thinly-disguised "independent source/inevitable-discovery" Trojan horse. First, such a question was not reached by the lower court. Secondly, no such doctrine should apply under the facts here. Thirdly, the Supreme Court already declined to consider this issue when a

lower court did not address it in Wilson v. Arkansas, 115 S. Ct. 1914, 1919, n. 4 (1995).

The opposing brief presents items which were not considered by the lower court in ruling. These are simply facts that would not be weighed unless the blanket rule were overcome. 201 Wis. 2d at 843, 549 N.W.2d at 220. ("The dispositive facts for purposes of this appeal can be stated succinctly.")

There is no misstatement of law or fact in the petition. The lower court opinion discusses warrants for felonious drug delivery. It is fine for misdemeanor drug possessors that they can rest assured of the right to have the police announce presence and purpose before entering the home. However, the Fourth Amendment should not be less in force merely because the police suspect a felony rather than a misdemeanor. Teenagers sharing a joint at a "pot" party may be engaging in felonious delivery under Wisconsin law, but, reprehensible as such conduct may be, do we really want the SWAT team busting in to stop it when a knock on the door by the local constable will probably suffice? Further, the difference between misdemeanor possession and felonious possession with intent to deliver could be that the possessor has his drugs in more than one bag. See e.g. Peasley v. State, 83 Wis. 2d 224, 231-32, 265 N.W.2d 506, 509-11 (1978) (No minimum quantity of substance is necessary to

sustain a conviction for possession of controlled substance; the fact that the defendant possessed 1/3 of a gram of cocaine in four packages is probative of intent to deliver ((a felony)); the state was not required to explain away at trial the possible inference that the small quantity was intended just for personal use rather than delivery).

It is thus a function of the complications of the law of intent that the distinction between felony and misdemeanor in drug cases is in the eye of the beholder (in this case, the officer executing the search warrant for drugs).

It may sound absurd and Kafka-esque to suggest that one could be killed in a raid of one's house for having an insignificant quantity of controlled substance, yet that is precisely what occurred in a "no-knock" raid that occurred in Beaver Dam, Wisconsin on April 17, 1995. See Wouk, Walter, "Shootings show pot laws deserve another look," Albany (N.Y.) Times Union, September 11, 1995, at A6; Imrie, Robert, "Slayings by cops soar in rural parts of state," Capital Times (Madison WI), February 15, 1996, at 6A. The raid occurred before Richards issued, but after the fixing of the blanket rule in State v. Stevens, 181 Wis. 2d 410, 511 N.W.2d 591 (1994).

The respondent maintains that the Supreme Court already denied certiorari in Stevens, supra. under

identical circumstances. No significance can be attached to the denial of a writ of certiorari other than the Court refused to take the case, see e.g. Brown v. Allen, 344 U.S. 443, 451-52 (1953).

In fact, the circumstances faced by Stevens and those now faced by Richards are not identical: the issues raised here revolve around the state court's interpretation of Wilson. The Wisconsin supreme court issued Stevens before Wilson came out. Further, Henry R. Schultz, the lawyer who sought certiorari for Bruce Stevens, told me that the petition was not perfunctorily denied: the petition for certiorari in Stevens was pending for a long time, and it was conferenced at least three times. The petition in Stevens contained the question of whether there was a constitutional basis for the rule of announcement. Faced with a choice between Stevens and Wilson for deciding this controversy, the Court may have had a cleaner case for determining the question in Wilson.

Lastly, while, as respondent contends, police may have the incentive to choose the method of entry safest for the police, the Fourth Amendment was not intended by the founders for the protection of government, but rather for protection of people against the excesses of government. Therefore, concerns for householder safety

should be foremost in considering the appropriateness of this case for certiorari.

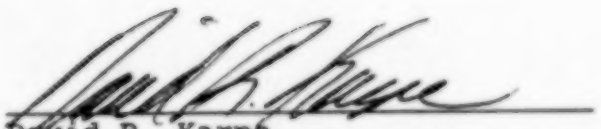
As Justice Scalia wrote in his concurring opinion in Minnesota v. Dickerson, 508 U.S. 366, 379 (1993),

> The purpose of the [Fourth Amendment's prohibition against unreasonable searches and seizures] is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted -- even if a later, less virtuous age should become accustomed to considering all sorts of intrusions "reasonable."

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,



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November 20, 1996

Mr. William K. Suter
Clerk
Supreme Court of the United States of America
One First Street NE
Washington DC 20543

Re: Richards v. Wisconsin, 96-5955

Dear Mr. Suter:

Would you please find enclosed the original and ten copies of petitioner's Reply to Brief in Opposition to Petition for a Writ of Certiorari? As evidenced by the enclosed affidavit of service, a copy has been served today by mail on counsel for respondent.

Thank you very much for your attention.

Very truly yours,

David R. Karpe

cc Stephen W. Kleinmaier
Wisconsin Department of Justice
P.O. Box 7857
Madison WI 53707

Supreme Court, U.S.
FILED
JAN 31 1997
CLERK

(5)

No. 96-5955

In The

Supreme Court of the United States

October Term, 1996

STEINEY J. RICHARDS,

Petitioner,

vs.

THE STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

JOINT APPENDIX

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Petition For Certiorari Filed September 10, 1996
Certiorari Granted January 3, 1997

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	
1/2/92	Complaint for Search Warrant and Search Warrant filed.
1/24/92	Reissued Criminal Complaint filed.
2/4/92	Preliminary Hearing held.
2/4/92	Information filed.
3/25/92	Notice of Motion and Motion to Suppress Search – Search Warrant filed.
9/9/92	Evidentiary Hearing held.
10/7/92	Motion to Supplement Record filed.
10/12/92	Motion Hearing, Plea and Sentencing held.
10/12/92	Judgment of Conviction entered.

COMPLAINT FOR SEARCH WARRANT

STATE OF WISCONSIN	)	In the Circuit
	) ss.	Court of the
COUNTY OF DANE	)	County of Dane.

DETECTIVE RICHARD PHARO, being duly sworn, on oath complains to the said Court of the County of Dane, that on December 30, 1991, in the County of Dane, that there are now located and concealed in and upon certain premises and persons unknown within said premises, in the City of Madison in said Dane County, Wisconsin, and more particularly described as follows:

> Room 138 of the Ramada Inn Motel, located at 3841 E. Washington Avenue, which is further described as a multi-room motel. Room #138 has the white numerals "138" against a black background affixed to the entry door of that room.

certain things, to-wit:

> Cocaine base and all other instrumentalities including but not limited to scales and packaging materials. Books, records, receipts, notes and other papers relating to the distribution of controlled substances. Address or telephone books reflecting customers' names and price lists. U. S. currency, precious metals, jewelry or other documents evidencing money transactions. Documents tending to identify the residents or persons in control of said premises. Any and all firearms which may be upon said premises.

which things may constitute evidence of a crime, to-wit: Possession with Intent to Deliver a Controlled Substance, committed in violation of Section(s) 161.41(1m) of the

Wisconsin Statutes; and prayed that a Search Warrant be issued to search said premises and persons unknown within said premises for the property aforesaid. That the facts tending to establish grounds for issuing a Search Warrant are as follows:

*1) FACTS:

Your complainant is a detective with the City of Madison Police Department presently assigned to the Intra County Vice and Narcotics Unit commonly referred to as METRO which investigates the trafficking of narcotics and other dangerous drugs. While so assigned, your complainant has participated in hundreds of investigations involving violations of the Wisconsin Uniform Controlled Substances Act. Your complainant has received training in drug investigation techniques and the identification of controlled substances from the Wisconsin Department of Justice, the Federal Drug Enforcement Administration, chemists from the Wisconsin State Laboratory and from senior detectives of the Metro Narcotics Unit. Your complainant has participated in over two hundred investigations for controlled substance violations and has assisted in at least 100 search warrants. During the execution of said search warrants and during the involvement of the aforesaid drug investigations, your complainant has learned the following:

a. that individuals who derive their income or a large portion of their income from the sale of controlled substances commonly maintain on hand large amounts of U.S. currency in order to maintain and finance their ongoing narcotics business;

b. that it is common for drug traffickers to secret contraband, proceeds of drug sales, large amounts of currency, financial instruments and records of drug transactions in secure locations within their residence for ready access and to conceal those items from law enforcement authorities;

c. that drug traffickers commonly maintain address or telephone numbers in books or papers which reflect names, addresses and/or telephone numbers of their associates in the drug trafficking organization;

d. that drug traffickers commonly use scales to weigh controlled substances and also have on hand, packaging materials, including but not limited to plastic baggies or square pieces of cut paper;

e. that drug traffickers commonly maintain in their possession firearms at both their residence, place of distribution of controlled substances or vehicles used by drug traffickers in order to facilitate the distribution of controlled substances and to protect themselves from other drug traffickers or law enforcement officers. Your complainant has personally observed numerous firearms in the aforementioned places on numerous times during the execution of search warrants or during the course of drug investigations.

This complaint is based on information your complainant received from a citizen informant during the week of 12-22-91. Your complainant believes the information received from the citizen complainant to be truthful and reliable inasmuch as your complainant was able to verify a large portion of the information through independent means.

Your complainant learned from the citizen informant that there were a number of black males registered as guests at the Motel 6 motel located at 1754 Thierer Road, Madison, Wis. The citizen informant advised your complainant that there were at least four black males from the Detroit, Michigan area who were staying at the motel who were presently engaged in drug trafficking. Your complainant learned from the citizen informant that the four black males had been in the Madison area for one week previous to the week of 12-22-91. The citizen informant also advised your complainant that one of the black males was described as being in his 20's, approx. 5'9", and well over 200 lbs.

Your complainant states that your complainant personally learned the following information from the management at Motel 6 and from Police Officer Bill Murphy, who is presently assigned to the Metro Narcotics Unit, that since approx. 12-15-91, there were four black males staying in at least two different rooms at Motel 6. Your complainant learned that as of 12-27-91, there were still two rooms rented to these four black males. Your complainant also learned that since staying at the motel, the black males would frequently refuse maid service, would always pay in cash for the rooms and made numerous phone calls from the rooms and also received numerous phone calls into their rooms.

It is your complainant's training and experience that drug traffickers who use motel rooms as a base for their drug trafficking, conduct their business in the aforementioned manner.

Your complainant learned from Officer Murphy that on 12-28-91 Officer Murphy learned that the four black males had checked out of the motel and Officer Murphy removed from their room after departure, a box of clear plastic sandwich baggies. Your complainant knows that clear plastic sandwich baggies are used as a packaging material for cocaine base which is sold on the street.

Your complainant learned that one of the persons registered at the Motel 6 listed a name of STEINEY RICHARDS with an address 11415 Sorrello, Detroit, Michigan. Your complainant learned from Officer Murphy, who is presently assigned to the Metro Narcotics Unit, that Officer Murphy contacted the Detroit Police Department and learned that on 1-07-91, STEINEY RICHARDS, M/B, DOB 11-12-72, was arrested while in possession of 63 packets of cocaine. At the time of RICHARDS' arrest, RICHARDS used an address of 11415 Sorrento, Detroit, Michigan. Your complainant learned that the description given by RICHARDS at the time of his arrest, was listed as 5'9", 280 lbs.

Your complainant believes the information provided by the Detroit Police Department to be truthful and reliable inasmuch as the information was kept during the normal course of business as a police department and your complainant has relied on information from police departments in the past and always found the information to be truthful.

Your complainant believes the information provided by Police Officer Bill Murphy to be truthful and reliable as your complainant has relied on information provided by Officer Murphy previously and the information was

obtained while Officer Murphy was performing his duties as a sworn City of Madison police officer.

Your complainant believes the information provided by the management of Motel 6 to be truthful and reliable inasmuch as the information is kept as the normal course of business for the motel.

Your complainant advises that your complainant went to the Ramada Inn located at 3841 E. Washington Ave., Madison, Wis., and learned that STEINEY RICHARDS checked into their motel in the early morning hours of 12-28-91 and paid cash for room #138 through 1-04-92. Your complainant learned that at the time of registration, RICHARDS used an address of Laro 11415, Detroit. Your complainant learned while talking with management at the Ramada Inn that since checking in on 12-28-91, RICHARDS has made at least 51 out going phone calls from room #138.

Your complainant states that your complainant personally observed the Ramada Inn Motel located at 3841 E. Washington Ave., City of Madison, Wis. and further observed room #138 and advises that it is the same as described on the front page of the complaint and search warrant.

~~Your complainant request that a NO KNOCK search warrant be approved as your complainant has learned through training and experience that drug traffickers commonly have weapons in their possession while involved in drug trafficking.~~ [MAF]

WHEREFORE, complainant prays that a Search Warrant be issued to search said premises and persons

unknown within said premises, for the property aforesaid.

/s/ Det – Richard Pharo

Subscribed and sworn to before me
this 31 day of December, 1991.

/s/ Mark A. Frankel
Judge of Circuit Court, Branch 12

Your complainant further states that in your complainant experience, drug traffickers from out of state using motels as a base of operations, keep controlled substances in their rented rooms. RDP [MAF]

SEARCH WARRANT

STATE OF WISCONSIN	)	In the Circuit
	) ss.	Court of the
COUNTY OF DANE	)	County of Dane.

(Filed January 2, 1992)

THE STATE OF WISCONSIN, to the Sheriff, or any other peace officer for said County:

WHEREAS, Detective Richard Pharo had this day complained in writing to this Court of the County of Dane, upon oath, that on December 30, 1991, in the County of Dane, that there are now located and concealed in and upon certain premises and persons unknown within said premises, in the City of Madison, in said Dane County, Wisconsin, and more particularly described as follows:

> Room 138 of the Ramada Inn Motel, located at 3841 E. Washington Avenue, which is further described as a multi-room motel. Room #138 has the white numerals "138" against a black background affixed to the entry door of that room.

certain things, to-wit:

> Cocaine base and all other instrumentalities including but not limited to scales and packaging materials. Books, records, receipts, notes and other papers relating to the distribution of controlled substances. Address or telephone books reflecting customers' names and price lists. U. S. currency, precious metals, jewelry or other documents evidencing money transactions. Documents tending to identify the residents or persons in control of said premises. Any and all firearms which may be upon said premises.

which things may constitute evidence of a crime, to-wit: Possession of a Controlled Substance with Intent to Deliver, committed in violation of Section(s) 161.41(1m) of the Wisconsin Statutes; and prayed that a Search Warrant be issued to search said premises and persons unknown within said premises for the property aforesaid.

NOW, THEREFORE, in the name of the State of Wisconsin, you are commanded forthwith to enter said premises ~~without the compliance of the knock and announce rules so long as the circumstances described herein obtained up to entry into said premises exists~~ [MAF] and search the said premises and persons unknown within said premises for the property aforesaid, and return this Warrant within forty-eight hours, before the said Court.

WITNESS, the Honorable MARK A. FRANKEL, Judge of Circuit Court, Branch 12 Dane County, Wisconsin, this 31 day of December, 1991.

/s/ Mark A. Frankel
Judge

ENDORSEMENT

Received by me this 31 day of December, 1991, at 2:00 o'clock A.M.

/s/ Det Richard Pharo
~~(Sheriff)~~ (Peace Officer)

CIRCUIT COURT)
) ss.
COUNTY OF DANE)

RETURN OF OFFICER

Dated this 2 day of January, 1992

at Madison Wisconsin.

I hereby certify that by virtue of the within Warrant, I searched the within named premises and found the following:

See Attached List

and have the same now in my possession subject to the disposition of the Court.

/s/ Illegible
(Sheriff) ~~(Peace Officer)~~

1 M20191 Pacific Bell calling card to ERICKA DATES, no. 819-945-4802-2334, Badger Cab business card with names and phone nos., Motel 6 paperwork, misc. papers with names and phone nos., Dominos napkin with numeric notations. Found on the dresser top, south wall.

MPD Prop. Room

2 M20191 Photo ID card for TERRELL CARTER for McKenzie High School, Detroit. Found inside left pocket of blk coat.

MPD Prop. Room

3 M20191 One box of Flavor-lock sandwich baggies, piece of paper with numerous phone nos. Found on nightstand, north wall.

MPD Prop. Room

4 M20190 Plastic K-Mart bag containing the following items:

4A – white athletic sock
4A1 – empty plastic sandwich baggie
4A2 – baggie containing 4A3 and 4A4.
4A3 – knotted plastic baggie with approx. 24.3 grams of suspect cocaine base weighed w/baggie.
4A4 – knotted plastic baggie with 24.5 grams of suspect cocaine base weighed w/baggie.
4B – white athletic sock
4B1 – plastic baggie containing 4B2, 4B3, and 4B4.
4B2 – 23.8 grams of suspect cocaine base weighed w/baggie.
4B3 – 24.6 grams of suspect cocaine base weighed w/baggie.

4B4 – 21.6 grams of suspect cocaine base weighed w/baggie.
4C – one knotted plastic baggie containing numerous clear plastic zip loc gem packs containing suspect cocaine base weighing 7.5 grams with packaging.
4D – one knotted plastic baggie containing numerous clear plastic zip loc gem packs containing suspect cocaine base weighing 7.5 grams with packaging.
4E – one knotted plastic baggie containing numerous clear plastic zip loc gem packs containing suspect cocaine base weighing 7.6 grams with packaging.
4F – one knotted plastic baggie containing 30 clear plastic zip loc gem packs containing suspect cocaine base, total weight 7.5 grams with packaging.
All the above were found above ceiling tile in bathroom in Room 138.

Metro Locker 7

5 M20190 Plastic Ramada Inn bag containing Item 5A.

Metro Locker 7

✔5A M20191 $2,890 in U. S. currency, all folded in $100 increments, with the exception of $90. Located above ceiling tile in bathroom of Room 138.

Metro Locker 7

CIRCUIT COURT
STATE OF WISCONSIN DANE COUNTY

REISSUED
CRIMINAL COMPLAINT

STATE OF WISCONSIN, PLAINTIFF

VS.

87187
STEINEY J. RICHARDS DOB: 11/12/72
Sex/Race: Male/Black
Height/Weight: 5'9/260 9435 Grandville Road
Hair: Black Detroit, Michigan
DEFENDANT(S)

OFFENSES: POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE BASE) WITH INTENT TO DELIVER
TAX STAMP VIOLATION

STATUTE(S) VIOLATED: 161.41(lm)(cm)4; 139.95(2)

COMPLAINING WITNESS:
Charles Flad

AGENCY & CASE NO: MAPD-METRO/574030
COURT CASE NO.: 92 CF 124

THE ABOVE-NAMED COMPLAINING WITNESS BEING DULY SWORN SAYS THAT THE ABOVE-NAMED DEFENDANT IN THE COUNTY OF DANE, STATE OF WISCONSIN, DID, on or about December 31, 1991, at the City of Madison, knowingly possess a controlled substance, cocaine base, in an amount more than 40 grams, with intent to deliver same; contrary to Section

161.41(lm)(cm)4 of the Wisconsin Statutes; and upon conviction shall be fined not less than $25,000.00 nor more than $1,000,000.00 and shall be imprisoned for not less than ten (10) years nor more than thirty (30) years.

AND AS A SECOND AND SEPARATE OFFENSE THE ABOVE-NAMED DEFENDANT IN THE COUNTY OF DANE, STATE OF WISCONSIN, DID, on or about December 31, 1991, at the City of Madison, being a dealer, possess cocaine base that did not bear evidence that the tax under Section 139.88 of the Wisconsin Statutes has been paid; contrary to Section 139.95(2) of the Wisconsin Statutes; and upon conviction may be fined not more than $10,000 or imprisoned for not more than five (5) years or both.

**FACTS: Dane County Sheriff's Department Detective Jeffrey Teuscher reports that on December 31, 1991, he participated in the execution of a search warrant at Room 138 in the Ramada Inn, located at 3841 East Washington Avenue, in the city of Madison, Dane County, Wisconsin. Detective Teuscher reports that he prepared a report regarding items seized pursuant to the warrant and the testing and weighing of a number of these items, and a copy of this report is attached to and by reference incorporated in this complaint.

Detective Mary Ricksecker of the Madison Police Department reports that she participated in the execution of the above-described warrant and was stationed outside of the motel room at the time entry was made. Detective Ricksecker reports that an individual later identified with a Michigan driver's license as Steiney J. Richards, Jr. broke through the window of Room 138 and began running

away from the motel. Detective Ricksecker reports that Richards was subsequently apprehended by other officers.

Detective M. Tanya Molony of the Dane County Sheriff's Department reports that she participated in the execution of the above-described search warrant and as she entered the room she saw a person, later identified verbally as Jerel E. Dates, standing in the corner of the room.

Detective Richard Pharo of the Madison Police Department reports that he spoke to the management at the Ramada Inn and learned that Steiney Richards had checked into the motel on December 28, 1991, at approximately 2:00 a.m. and had paid for a room at the motel through January 4, 1992 in cash. The desk clerk also informed Detective Pharo that from December 28, 1991 through the evening of December 30, 1991, approximately 51 outgoing phone calls were made from the room. The clerk also informed Detective Pharo that two people were registered for the room. Detective Pharo reports that immediately after he and other officers announced that they were police officers, he heard breaking glass, which Detective Pharo later learned was caused by Richards jumping through the closed glass window in the room.

Detective Pharo reports that he obtained from the Dane County Sheriff's Department records inked finger and palm prints of the defendant, which were identified by said records as being those of Defendant Steiney J. Richards, and transported them to the Wisconsin State Crime laboratory where he turned them over to Anthony Spadafora.

Detective Teuscher reports that he transported the suspect controlled substance, identified in his report under Item #4, and the plastic Ramada Inn bag, identified as Item #5, to the Wisconsin State Crime Laboratory, where these items were assigned Wisconsin State Crime Laboratory Case Number M92-27.

Your complainant has viewed reports of laboratory findings prepared by Chemist Guang S. Zhang, a copy of which is attached to and by reference incorporated in this complaint. Your complainant has also reviewed a Wisconsin State Crime Laboratory report prepared by Anthony Spadafora, identified as a preliminary report, a copy of which is attached to and incorporated in this complaint.

Your complainant believes the information contained in said reports to be truthful and reliable because your complainant knows that Chemist Guang Zhang has testified as an expert in the field of the chemical and other identification of controlled substances in the courts of the state of Wisconsin, and that Anthony Spadafora has testified as an expert in the courts of the State of Wisconsin in the field of fingerprint identification and comparison.

**THIS COMPLAINT IS BASED ON the information and belief of your complainant, who is a Police Officer with the Madison Police Department, and relies on information provided by Dane County Sheriff's Department Detectives Jeffrey Teuscher and M. Tanya Molony, and City of Madison Detectives Richard Pharo and Mary Ricksecker, all of whom your complainant knows from prior experience to be truthful and reliable. Further, your complainant believes the information obtained from the desk clerk/management of the Ramada Inn to be truthful

and reliable because is [sic] was taken from records kept and maintained by the motel in the usual course of business.

SUBSCRIBED AND SWORN TO BEFORE ME AND APPROVED FOR FILING THIS 24th DAY OF JANUARY, 1992.

/s/ Illegible
DEPUTY/ASSISTANT
DISTRICT ATTORNEY

/s/ Det. Charles P. Flad
COMPLAINANT

CIRCUIT COURT
STATE OF WISCONSIN DANE COUNTY
BRANCH 1

STATE OF WISCONSIN,
Plaintiff,
-vs- Case No. 92 CF 124
STEINEY J. RICHARDS,
Defendant.

[10] • • •

JEFFREY A. TEUSCHER:
being first duly sworn,
on oath, testified as follows:

DIRECT EXAMINATION BY MS. SCHWAEMLE:

Q Could you state your full name, sir, and spell your last name?

A Jeffrey A. Teuscher, T-e-u-s-c-h-e-r.

Q And are you a detective with the Dane County Sheriff's Department?

A That is correct.

Q Were you working in that capacity, Detective Teuscher, on December 31st of 1991?

[11] A Yes, I was.

Q On that date, did you have occasion to participate in the execution of a search warrant at the Ramada Inn here in the city?

A Yes, I did.

Q Where is the Ramada located that you were at?

A It's the 3800 block of East Washington Avenue in the City of Madison, Dane County, Wisconsin.

Q Can you describe what occurred when you attempted to make entry to execute the warrant at that location?

A Myself and another police personnel entered the room and as we went through the door, I observed a black male subject just going through the window of the room into a courtyard.

Q The room where you executed the search warrant, is this one of the rooms that is held out for rental by the Ramada Inn?

A Yes, it is.

Q This black male that you saw go through the window, did you have occasion to see him again?

A Yes, I did.

Q Would you recognize him again if you saw him?

A Yes, I would.

Q Do you see him here today?

A Yes.

Q Could you tell us where he is?

[12] A It's Mr. Richards seated at defense table with the blue shirt on.

Q May the record reflect that this witness has identified the defendant?

THE COURT: It will.

MS. SCHWAEMLE:

Q Was the window open or closed when Mr. Richards went through it?

A Closed.

Q Did you locate anything in the room that you searched, the room that Mr. Richards jumped out of pursuant to your warrant?

A Yes, I did.

Q Can you describe, Detective Teuscher, what items you located?

A I found in the bathroom above a ceiling tile, a false ceiling tile, two plastic bags.

Q The two plastic bags, where were they located in relation to one another?

A Right next to one another.

Q And what was contained within these two plastic bags?

A One bag contained approximately $3,000 in U.S. currency, the other plastic bag contained a white athletic sock with two baggies of large chunks of cocaine base. It contained another white athletic sock.

[13] * * *

A There was another white athletic sock that contained three baggies of a large one-piece chunk of what appeared to be cocaine base. It also contained four baggies which contained numerous Zip-loc gem packs, clear in color, which also appeared to contain cocaine base.

Q When you describe this last baggie containing numerous Zip-loc or gem pack packages of cocaine base, can you tell us approximately how many there were?

A Yes, I opened one of them and found one of the bags to contain 30 of these Zip-loc gem pack baggies. I subsequently weighed that with the packaging material and weighed the other three baggies which contained the gem packs, all of them were similar in weight and size so I assume that there was approximately 30 baggies in each one of the four.

Q Detective Teuscher, do you have any training or experience as a narcotics investigator?

A Yes, I've been a detective assigned to the narcotics section for approximately twenty months now. I've assisted in the execution of at least 75 search warrants concerning [14] controlled substance violations. I've also assisted in over 300 investigations of controlled substance violations.

Q Based on that experience, do you have an opinion regarding the street value of cocaine base on or about December 31, 1991 in Dane County?

* * *

A Yes, the Zip-loc – the gem packs sell for approximately $20 apiece and it's been my experience that when we purchase these gem packs, there's around a 10th of a gram of cocaine base in them and so we're paying $20 for approximately a 10th of a gram. If you multiply that times the number of gem packs, you're going to have approximately $2300 to $2400 worth of cocaine base just in the gem packs. The larger packages I conservatively estimated them at a hundred dollars a gram. Realistically

when they're divided up, we end up paying approximately $200 a gram, but when I weighed the total weight of the larger packages, that was a conservative estimate at the time of a hundred dollars a gram.

Q With respect to the packages containing what appeared to you to be cocaine base, were there any markings or identifiers of any kind on the containers other than the athletic sock that may have had some kind of trademark on it?

A No, there was nothing visible. I also examined each of the [15] packages looking for a Wisconsin controlled substance tax stamp and was unable to locate a tax stamp on any of the packages of substance.

* * *

Q Did you locate anything that you seized from the room that was not secreted in the ceiling tiles?

A Yes, I did.

Can you describe what among those items that you recall that you seized?

A There was a box of sandwich baggies located on a night stand between the two beds. There was some papers that had numeric notations on with different names of people and some papers with names and phone numbers on.

Q The items that you seized and that you have described thus far, Detective, what did you do with them after you seized them?

A I sealed them as evidence and transported some of those items to the Wisconsin State Crime Lab.

Q Who did you turn them over to at the crime laboratory?

A I turned over the packages of controlled substance to Chemist Guang Zhang and turned over some plastic baggies or [16] plastic bags that the substance and currency was found in to Anthony Spadafora who works in the Identification Section of the Wisconsin State Crime Lab.

Q And were these items of evidence that you turned over assigned a case number by the crime laboratory?

A Yes, they were.

Q What number?

A I believe it was M9227.

Q In addition to the items that you seized pursuant to the search warrant, did you transport anything else to the crime laboratory, and in particular to Anthony Spadafora regarding this case?

A I transported a fingerprint card which had Mr. Richards' fingerprints on and another fingerprint card which had Mr. Dates' fingerprints on.

Q The fingerprint card regarding Mr. Richards, did that appear to bear his signature?

A Yes, it did.

Q And where did you obtain that fingerprint card from?

A From the Dane County Jail.

Q And was that taken from records kept and maintained by the Dane County Sheriff's Department in the course of its duties – the fingerprint card?

A The fingerprint card that I transported to the crime lab was an additional fingerprint card that was requested to be [17] taken from the suspects. It expedites things for the personnel at the crime lab to have those there and at the same time our Records Section there will be another card that went to records.

Q The fingerprint card that you transported with Mr. Richards' name on it, was that a record that is generally kept and maintained by the department in the course of its official duties?

A Yes.

* * *

Q While any of the items that you've described were in your possession, Detective Teuscher, did you alter them in any way?

A No, I did not.

MS. SCHWAEMLE: Your Honor, I have had marked as Exhibits 1 and 2 original Wisconsin State Crime Laboratory reports.

MR. BERMAN: I have them.

MS. SCHWAEMLE: They're the same ones that are attached to the complaints and I would ask they be received.

[18] * * *

THE COURT: Exhibit 1 is received. Exhibit 2 is also received. At least my interpretation of the testimony

is that when they are going to do fingerprinting, it is standard procedure in the ordinary course of business to take a second card for administrative reasons. They could have taken either card out obviously, but I think it fits within the hearsay exception so I'll receive Exhibit 2 also. Any other questions?

MS. SCHWAEMLE:

Q What time of day, Detective Teuscher, did you and the other officers make entry into this motel room?

A At approximately 3:40 a.m.

Q And do you recall how Mr. Richards was dressed at the time that he went through the window?

A I recall he didn't have a shirt on.

Q In executing this warrant, did you observe any signs of [19] occupancy of this room?

A There was clothing in the hotel room, some luggage or carrier bags, there was jackets, there were the keys to the room lying inside, the hotel keys.

Q Lying inside where?

A I believe they were a lying on one of the dresser tops.

Q In addition to the two plastic baggies that you described containing currency and cocaine base, was there anything else secreted with those items above the ceiling tile?

A No.

Q Thank you, Detective.

THE COURT: Mr. Berman.

CROSS EXAMINATION BY MR. BERMAN:

Q Detective, were you the first one at the door of the motel room when the search was executed?

A I was not.

Q You were not. Do you recall who that was, who was first at the door?

A Contact was first made by Detective Pharo.

Q And so Detective Pharo was the first one to go through the door, is that your recollection?

A No.

Q Who was the first one?

A The first person to go through the door I believe was Officer Pereguoy.

[20] Q You indicated that you went to this motel room No. 138, correct?

A That is correct.

Q And you attempted to make entry. Was there an instance where you were unable to make entry to the motel room?

A Detective Pharo had made contact with Mr. Richards and Mr. Richards subsequently slammed the door shut.

Q All right. How was it that Detective Pharo made contact with Mr. Richards?

A Detective Pharo was attempting to get Mr. Richards to open the door willingly. He was using a ruse as a maintenance person.

Q So Detective Pharo went to the door and used this ruse saying he was a maintenance person?

A Correct.

Q And he said words to the effect open the door, maintenance man, something like that?

A I don't know what his words were exactly.

Q Were you there?

A I was in the room across the hall.

[21] * * *

Q And then after the door was closed on Detective Pharo, did he then effect entry through use of force?

A At that point I believe he shouted "police officers, open the door," at which time I think he attempted to kick it.

Q Well, were you in the room across the hall at the time?

A Yes.

Q And was the door to the room across the hall closed when Detective Pharo was effecting entry to Room 138?

A Yes.

Q So you didn't actually observe Detective Pharo get the door open in whatever fashion to Room 138?

A No, I observed it because I was watching through the security peephole.

Q Then you said you believed that he – you said you believe that he somehow got the door open as a maintenance man, correct?

A Correct, and the door was slammed shu[illegible] which point he yelled "police officers," and I think he kicked the door, but it didn't budge. We at that point came out – were coming out of the room across the hall at which time Officer Pereguoy kicked the door and it opened and we entered.

Q There was another individual in the room when you got into the room, correct?

A That's correct.

[22] * * *

Q How was Mr. Pharo dressed?

A He had on a Ramada Inn shirt.

* * *

Q Now, there's another individual in the room when you got in, correct?

A Correct.

Q That's a Mr. Dates?

A That's correct.

Q Jerel Dates?

A Correct.

Q Did you go through any papers, forms of identification, documents, that sort of thing that you found in the room?

A Yes.

Q And you found items relating to an Erica Dates, did you not?

A Yes.

Q In fact, a Pacific Bell calling card relating to Erica Dates?

[23] A Correct.

Q You also found an ID card for a Turell Carter in a coat in the room, correct?

A Correct.

Q Now, you indicated that you had to search for items listed in the search warrant, correct?

A Correct.

Q And the items that you suspected as being controlled substance were not out in the open, were they?

A No, they are not.

Q And they were not in plain view, were they?

A No.

Q You indicated they were found above a false ceiling tile. By false ceiling tile, that's one the Ramada Inn had installed, right?

A Correct.

Q That wasn't something that someone had come in later and put in some false ceiling tile in the bathroom; it

appears that's the way the room had been furnished, correct?

A Correct.

Q Did you undertake a search of Steiney Richards' person?

A I did not.

Q Were you present when that was done?

A I don't believe so.

Q You're not aware, are you, of any large amounts of currency [24] being found on Steiney Richards' person, correct?

* * *

A Based on observations I do not know.

* * *

Q I'm sorry, you do not know?

A No.

Q In order to get to this substance which you believe to be cocaine base above the ceiling tile, did you have to stand up on something and remove the ceiling tile and look in there for it?

A I'm quite short so I had to stand on top of the toilet and just lift up one of the tiles of the suspended ceiling and it was right there.

Q Would a person walking into the bathroom just ordinarily and using the bathroom to wash up, take a shower or whatever would not see these gem packs and the currency, correct?

A No.

Q Did you take a look at the pieces of paper with notations [25] that were found in Room 138?

A Yes.

Q And what did you believe them to be?

A Well, there were three names on one of the – on a napkin. One was Steve, the other one was Ro, and the other one I don't recall the name, but they had numeric notations at the end of them and then were crossed off like a balance sheet; and one of the notations was for a hundred, one of the other ones I believe was for, to the best of my recollection, 1700 and one of them was 890 and I believe those to be balance sheets because if you add up the totals of those amounts, they come out to, I don't know, about 2690, I believe, and if you look at the money that was found above the ceiling tile, we find 2890. Now, the unusual correlation between that is you have somebody on a sheet that has $890 and then you look at the money above the ceiling tile and you have money ending – you have $2890 or something close to that, so there's a correlation there. I believe that the monies on the napkin, or the amounts on the napkin were monies brought to the persons in that room and they were scratched off because that was the payment for cocaine base that was fronted out to them.

Q Now, you indicated you believe that it signified monies brought to the persons in that room. Did you find any clothing, personal effects of Mr. Richards in Room 138?

[26] A I don't recall any identification, but there were jacket – there was a jacket, other items of clothing; whether they were Mr. Richards' or not, I'm not sure.

Q How many people appeared to be residing in that room based upon your execution of the search warrant?

A Two.

Q I take it you didn't find it unusual that Mr. Richards was not wearing a shirt at 3:40 in the morning?

* * *

Q Did you perform any further investigation with regard to any phone numbers that you found in the room?

* * *

A I didn't discover any information as to the phone numbers.

Q Aside from the suspected controlled substances found in the hiding place above the ceiling tile, I take it you didn't find any controlled substances anywhere else in Room 138, true?

A True.

* * *

CIRCUIT COURT
STATE OF WISCONSIN DANE COUNTY
BRANCH 1

STATE OF WISCONSIN,

Plaintiff,

-vs-

STEINEY J. RICHARDS,

Defendants.

INFORMATION

Case No. 92 CF 124

(Filed February 4, 1992)

I, the undersigned, Assistant District Attorney for said Dane County, Wisconsin, hereby inform the said court that STEINEY J. RICHARDS, at the City of Madison, in said County, on December 31, 1991, against the peace and dignity of the State of Wisconsin, did, knowingly possess a controlled substance, cocaine base, in an amount more than 40 grams, with intent to deliver same; contrary to Section 161.41(1m)(cm)4 of the Wisconsin Statutes; and upon conviction shall be fined not less than $25,000.00 nor more than $1,000,000.00 and shall be imprisoned for not less than ten (10) years nor more than thirty (30) years.

AND AS A SECOND AND SEPARATE OFFENSE THE ABOVE-NAMED DEFENDANT IN THE COUNTY OF DANE, STATE OF WISCONSIN, DID, on or about December 31, 1991, at the City of Madison, being a dealer, possess cocaine base that did not bear evidence that the tax under Section 139.88 of the Wisconsin Statutes has been paid; contrary to Section 139.95(2) of the Wisconsin Statutes; and upon conviction may be fined not more than

$10,000 or imprisoned for not more than five (5) years or both.

DATE February 4, 1992 /s/ Judy Schwaemle
~~Deputy~~/Assistant
District Attorney

CIRCUIT COURT
STATE OF WISCONSIN DANE COUNTY
BRANCH 1

STATE OF WISCONSIN

Plaintiff,

vs. Case No. 92-CF-124

STEINEY J. RICHARDS (Filed 3-25-92)

Defendant.

NOTICE OF MOTION AND MOTION
TO SUPPRESS-SEARCH WARRANT

TO: Judy Schwaemle
Assistant District Attorney
210 Martin Luther King Jr., Blvd.
Madison, WI 53709

PLEASE TAKE NOTICE that Steiney J. Richards, by his attorneys, Giesen & Berman, S.C. will move the Court at a time and date to be set, for an Order suppressing all evidence derived directly or indirectly from the execution of a search warrant on room 138 of the Ramada Inn Motel located at 3841 East Washington Avenue in Madison, Wisconsin, a copy of which warrant is attached to this Motion as Exhibit I, on the ground that the complaint for search warrant, a copy of which is also attached as part of Exhibit I, fails to set forth sufficient facts to establish probable cause that the items sought would be in the place to be searched, and further on the basis that the law enforcement agents executing the warrant failed to sufficiently identify themselves and their purpose, and allow

time for the door to the room to be opened, and thus the search warrant and the execution of that search warrant were in violation of Steiney J. Richard's rights under the Fourth Amendment to the United States Constitution, Article I, Section 11 of the Wisconsin Constitution, and the Wisconsin Supreme Court's holding in *Morales v. State*, 44 Wis. 2d 96, 106 (1969).

And for such other and further relief as the court deems just and equitable in the premises.

Steiney J. Richards respectfully requests an evidentiary hearing on this Motion.

Dated and signed this 24th day of March, 1992.

/s/ Morris D. Berman
Morris D. Berman
Giesen & Berman, S.C.
Attorneys for Steiney J. Richards
14 South Broom Street
P.O. Box 909
Madison, WI 53701
(608) 255-8200

CIRCUIT COURT
STATE OF WISCONSIN DANE COUNTY
BRANCH 1

STATE OF WISCONSIN, Plaintiff,	:	
-vs-	:	Case No. 92 CF 124
STEINEY J. RICHARDS, Defendant.	:	

[14]* * * *

RICHARD PHARO

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MS. SCHWAEMLE:

Q Could you state your full name, please, and spell your last?

A Richard Pharo. The last name is spelled P-h-a-r-o.

Q And you are a detective with the City of Madison Police Department?

A I am.

Q How long have you been a law enforcement officer?

A A little over 22 years.

[15] Q Detective Pharo, were you working in that capacity at approximately 3:40 a.m. on December 31st of 1991?

A Yes, ma'am.

Q At that time did you and other officers participate in the execution of a search warrant at Room 138 at the Ramada Inn?

A I did.

* * *

BY MS. SCHWAEMLE:

Q What happened when you tried to get into the room?

A I went to the room, knocked on the door. The door opened. I noticed that there was a black male on the other side of the door.

At that time, the door was open approximately an inch and a half. When the black male was looking at me at first, he then looked over my right shoulder and there was an expression on his face that is – it's hard to describe, but the expression led me to believe that he [16] probably saw –

* * *

A When the black male had the door partially opened and looked over my right shoulder, approximately three to four feet away was a police officer in full military uniform, and from the expression on his face, which I can only describe as surprise, I started with my hand on the doorknob, was going to start to go in, and the door got slammed.

The length of time from when the door was opened to where the black male inside looked at me and then

looked over my shoulder and shut the door was maybe four to five seconds, if that.

Once the door was shut, I tried the doorknob, and I [17] believe I heard the door lock or the door latch or door lock being locked, and at that time we announced ourselves as police officers.

The door was kicked at least twice, and after the door was kicked, it didn't move. There was another officer that ran from across the hall and used his shoulder to force the door open. As the door opened, I heard glass breaking.

Q How many police officers are standing outside the door with you when the door is opened?

A To my right there were at least three police officers, one of which was in uniform. The other officers were in plain clothes. And to my left, there were at least two officers in plain clothes. Directly across the hall from Room 138 we had obtained another room from the management.

Q Were those –

A And there were at least three people, but I believe that door was closed when I made initial contact at Room 138.

Q When you knocked on the door, Detective Pharo, to Room 138 as you've indicated, did you say anything?

A Yes.

Q What did you say?

A Someone inside asked who was there, and I advised I was the maintenance man.

[18] Q And how were you clothed at that time?

A At that time, I think I had a pair of jeans on, and I had obtained from the management of the motel a dark blue shirt, and in the pocket area was the Ramada Inn logo, I believe.

Q So you were dressed as a maintenance man?

A Yes, ma'am.

Q How far away was the uniformed officer from you?

A Three to four feet.

Q And was this uniformed officer over your right shoulder?

A Yes, ma'am.

Q In the direction that the person who answered the door was looking?

A Yes.

Q How many times were the words "police officer" uttered before the door was eventually kicked in or shouldered in?

A At least twice, because I said it once, and I heard someone else yell it, and it may have been yelled after that, but I distinctly remember twice.

Q And did the door open at any time prior to being shouldered in, as you've indicated?

A No.

Q Would you recognize the person who answered the door, or did you recognize the person who answered the door for [19] the four to five seconds before it was slammed shut?

A I don't recall if I knew who it was at the time the door was cracked open or not.

Q But you were able to see – or were you able to see whether or not it was a black male?

A Yes, ma'am.

Q Prior to hearing the door lock as you've indicated, did you make any effort to open the door or gain entry into the door after it was slammed shut?

A Yes. I turned the doorknob and used some force with my arm to – as I was turning the doorknob, to try and swing the door open quickly.

Well, the door didn't move then, and I think it was at that time just as I grabbed the doorknob is when I heard the dead bolt go.

Q How soon after the door was slammed shut, Detective Pharo, did you or anyone else utter or yell as you've indicated "police officers?"

A Two or three seconds.

Q Thank you, detective. That's all I have.

THE COURT: Cross-examine.

CROSS EXAMINATION BY MR. BERMAN:

Q Detective Pharo, you were the affiant for the search warrant, correct?

A Yes, sir.

[20] Q And you applied for what's known as a no knock warrant, true?

A Yes.

Q And that request for no knock warrant was not granted by Judge Frankel, correct?

A Correct.

Q You went to the door of Room 138 posing as a maintenance man, correct?

A Yes.

Q And you were dressed as a maintenance man, correct?

A I had a Ramada Inn shirt on.

Q So you weren't dressed in uniform, correct?

A That's correct.

Q And when you went to the door, how did you announce yourself, when you went to the door of the Ramada Inn?

A I knocked on the door, and someone within asked who it was, and I stated I was the maintenance man.

Q And when the door was opened, it was opened for an inch and a half, correct?

A About an inch and a half, yes.

Q And when the door was opened, you again said that you were the maintenance man, correct?

A I don't recall if there was an exchange of words at that time. There was a peephole in the door, and that's when I stood in front of the door and knocked on it. After [21] the door was opened, I don't recall what the conversation was, if there was conversation.

Q When the door was opened for the inch and a half, you didn't display your badge or any other identification as a police officer, did you?

A No.

Q When the door was opened for the inch and a half that you testified about, you didn't identify yourself as a police officer, did you?

A No.

Q And at no time before the door was closed did anybody ever identify himself as a police officer, correct?

A No, I can't say that because there was a uniformed officer standing approximately three feet away from me, and the door being opened as it was, and the person standing over my shoulder –

* * *

[22] Q Before the door was closed, you did not say the words "police officer," correct?

A Correct.

Q And you believe you heard the words "police officer" once or perhaps twice before entry by force was made to the room, correct?

A I know I heard it, 'cause I announced it myself, and I heard someone else announce it. After that it may have been announced.

Q So what you said was "police officer."

A Yes.

Q After the door was closed on you the first time – you said it was opened for an inch and a half and then closed, correct?

A Yes.

Q After the door was closed, you never knocked on the door and said you were a police officer with a search warrant, did you?

A No, I didn't knock. I just hollered "police officer."

Q And two to three seconds after you said the words "police officer," you tried to open the door, correct?

A I was probably trying to open the door when I was doing that, and that's when I tried the doorknob and the door [23] didn't work.

Q And seconds after that, you started trying to kick the door open, correct?

A I kicked it once, and someone else bigger than me may have kicked it, and then someone else came from across the hall and broke the doorjamb to gain entry, yes.

Q But the kicking of the door happened a matter of seconds after the door was closed on you, correct?

A Yes, after I yelled "police officer," then we started the kicking, and there wasn't any response from inside verbally or opening the door.

* * *

[24] STEINEY J. RICHARDS

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BERMAN:

Q Will you state your name, both first and last name, and spell it for the reporter, please?

A My name is Steiney Richards, S-t-e-i-n-e-y, Richards.

Q How old are you, Mr. Richards?

A I'm 19 years old.

Q How far have you gone in school?

A This is my senior – '91 would have been my senior year. I would have graduated in January – in June of '92. I would have graduated in June of '92.

Q Mr. Richards, I want to draw your attention to December 31st of 1991. At that time were you residing in Room 138 at the Ramada Inn on East Washington Avenue in Madison?

A Yes.

Q Drawing your attention, then, to the early morning hours on that date, did someone knock on the door?

A Yes.

[25] Q After someone knocked on the door, did you then – what did you then do?

A I asked, "Who is it?" They said it was the maintenance man.

Q Did you look through any peephole or anything to try and see who it was?

A Yes, it's a peephole in the center of the door. I looked through that.

Q And could you see anybody out there?

A No, it was covered.

Q What did you do after that?

A I asked who was it again. They said maintenance man. I said, "Who?" They say, "Maintenance man." There's a chain on the door – there's a chain on the door, so I'm opening the door to look to see who is it, and he – Detective Pharo, I assume – hit the door trying to push it in, so I slammed the door back.

Q When you opened the door and saw Detective Pharo, how was he dressed?

A He had on a Ramada Inn shirt or jacket or something, but he wasn't dressed like a police.

Q Did he ever display to you when he was posing as a maintenance man that morning any badge?

A No.

Q When you looked out the door and saw Detective Pharo [26] dressed in a Ramada Inn shirt, did you see any police officers in uniform?

A I seen no one but Detective Pharo.

Q Was the door wide open when you opened it, or did you just open it a little bit?

A No, it's a chain that would let it only open so far. I didn't really get it open far enough for the chain. I was opening it a little bit. I didn't even get a chance to really get a good look around through the door before that Detective Pharo tried to force in.

Q What happened next?

A When I slammed the door, I ran to the window. I was looking out the window, and Jerel was in the corner by the table, and they were still hitting the door. No one said it was the police. They were still hitting the door. At that time me and Jerel looked at each other and were asking, "What are we going to do?"

By that time, they still hitting the door, so the conclusion was to get out the room. So I jumped out the window. Jerel never has time to make it around to the window. When I make it out the window, I mean, the officer yelled, "Police, freeze," and I stop.

Q Was that the first time you heard anyone ever say the word "police?"

A That was the first time.

[27] Q Did anyone ever knock on the door and say they were police, this is a search warrant?

A No.

Q Did anyone ever say that evening before entering the room that they had a – that they were police with a search warrant to execute on the room?

A No.

Q Anyone say anything about having a search warrant to execute on the room before they kicked the door open?

A No.

* * *

THE COURT: Cross-examine.

MS. SCHWAEMLE: I have nothing.

THE COURT: You can step down, Mr. Richards. Thank you for your testimony. Any further witnesses, Mr. Berman?

MR. BERMAN: No, sir.

THE COURT: Argument?

MS. SCHWAEMLE: Judge, there is a recent case that is essentially directly on point here. It's *State of Wisconsin versus Moss*, M-o-s-s. It's a Court of Appeals decision from January of this year that is published at 166 Wis.2d 73.

In that case, police with a search warrant went to a residence, knocked on the door, and the police officer [28] executing the warrant said "Pizza." The door was opened partially, and at that point the officer executing the warrant did announce himself as a police officer with a

search warrant, and the door was slammed shut, or at least it was attempted to be slammed shut, and that officer got his foot in the door, basically, so that it couldn't be slammed shut, and there was then a forced entry into that residence.

What the Court talks about in terms of the announcement rule, essentially, is that – I'm just going to read it to you, frankly, and I'm reading from 737, page 737.

"Although officers used a ruse to induce the person to open the door, they did not attempt to enter until they had identified themselves orally and visually and announced their purpose. When they did so, Moss began to close the door on them. Their forceful entry was in response to Moss's apparent intent to block them.

It is undisputed that officers are entitled to make a reasonable forcible entry after announcing their presence and purpose. Although the entry in this case occurred shortly after their announcement, Moss" – that was the defendant in that case – "already had opened the door, was aware of their presence and purpose, and had shown his intent to impede them."

[29] What we have here is Detective Pharo knocks on the door and gets the door opened by ruse, just like the pizza man in *Moss* did. He says, "I'm a maintenance man." The door is opened. What Detective Pharo sees is a person who answers that door who recognizes the uniform over his shoulder.

Detective Pharo says there is a look of surprise on his face. "There is a uniform right over my shoulder." What Detective Pharo believes is that the person who answered

this door sees that they are police officers, and in fact, that is consistent with what the person does because the door is slammed shut and locked at that point.

If in fact – if you want to believe Mr. Richards, he's locking the door on one person who is standing outside the door who is wearing a Ramada Inn uniform. Why is he locking the door? I submit it's because what's going on here is that there are in fact six people, as Detective Pharo testified, standing with him outside that door, and when the door is opened, Mr. Richards sees that there are six people standing there, it's not maintenance, and one of those people has got a police uniform on, and then the door is slammed.

The bottom line is that entry is not made into this – into Room 138 until they have announced at least [30] three times, by my recollection of the testimony – once by Detective Pharo, twice by other people – they don't make entry until they have yelled "police officers" three times. And that's the bottom line in the *Moss* case that the announcement rule applies to gaining entry.

You don't have to announce you're a police officer to get somebody to answer the door. You don't have to do any of those things, but before you cross the threshold, you have to say who you are and what you're up to. And that Detective Pharo and his companions complied with in this case.

I think this defendant, like the defendant in *Moss*, demonstrated a clear intention to resist their efforts to open the door. Not only was the door slammed shut. It was locked. And after repeated attempts to kick it in, it was not opened. It was never opened until it was forcibly

opened, and at that point, Mr. Richards is on his way out the window.

That door was not going to be opened. The officers had every right to forcibly enter, and before they forcibly entered, they announced themselves as police officers by yelling it. Whether or not Mr. Richards heard it – he testifies he doesn't hear it. Whether or not you believe that I suppose is up to you, but Detective Pharo testified that it was yelled repeatedly [31] at 3:40 in the morning when they're kicking on the door.

I think these officers have complied with the knock and announce rule and that the motion should be denied.

THE COURT: Mr. Berman.

MR. BERMAN: Your Honor, in my motion, I cited the Wisconsin Supreme Court case of *State versus Morales*. To my knowledge, that is still good law. Ms. Schwaemle has not indicated that that has been overruled by any case, including *Moss*.

I don't believe *Moss* really says a whole lot that's new. Certainly, the rule about being able to get into a premises by means of a ruse has been around for a long time.

But in any event, in *State versus Morales*, which is found at 44 Wis.2d, page 96, the Wisconsin Supreme Court held that police must identify themselves and their purpose and, except under special circumstances, allow time for the door to be opened in executing a search warrant.

That principle is repeated in many federal cases, and in fact, it's codified in Title 18 of the United States Code in Section 3109.

In this case, the evidence, even accepting Detective Pharo's testimony, is that the purpose was never announced; that at best, police said a couple of [32] times "police," and not that they had a search warrant.

In this case the testimony is uncontroverted that there was no knock by the police who said that they were police in announcing their purpose. There was no adequate opportunity for the occupants of the room to open the door. The only knock was by Detective Pharo when he was posing as a maintenance man.

Detective Pharo in that guise was refused admittance, and Mr. Richards was perfectly within his rights to refuse admission to a maintenance man. And I don't know – I don't think it's unusual at all that someone wouldn't want a maintenance man coming in at 3:40 in the morning.

So this is not a case like *Moss*, and just from the recitation of facts by Ms. Schwaemle, I think there are many facts distinguishing the cases. In *Moss*, before attempting to get in, the police did announce themselves as police and then the door was slammed shut. In this instance, the door was closed on the purported maintenance man who turned out to be Detective Pharo.

In *Moss*, according to Ms. Schwaemle's recitation of the case, the police announced their purpose. In this case their purpose was never announced, and hence, the rule in *Morales* was violated.

Ms. Schwaemle indicated the rule to be that the [33] police have to announce who you are and what you're up to, and in that case, this didn't occur. This is a case where the police did not comply with the knock and announce rule, and under the authority of *Morales*, the motion should be granted.

I guess I have one other point, your Honor. The assumption or the testimony that Mr. Richards must have seen uniformed officers standing out in the hall simply flies in the face of the physical evidence. According to the testimony, the door was opened an inch and a half.

Looking out through an inch and a half opening between the doorjamb and the door, a person is not going to see what's going on in the rest of the hallway, and police are not going to want to be in the field of vision because they would then lose the element of surprise.

* * *

THE COURT: I think to some extent the issues in this case turn on a number of other cases, and one is, as cited in *Moss, United States versus Covington,* which approves the use of ruse to enter a premises, as well as the *Cleveland* case in Wisconsin.

Hopefully, by use of a ruse, contact can be made with the occupants of the premises to be searched, at which time the announcement can be made under circumstances which then don't require the use of [34] forcible entry. And as is stated in *Covington,* if the ruse is unsuccessful, i.e., peaceful entry is not gained, then the police have the alternative of complying with the appropriate announcement requirement.

Now, the other case that I think is somewhat instructive is *State versus Meier,* 60 Wis.2d 452. In that case the officers did have a search warrant. They knocked on the door, and in that situation, the officers pushed the door open when the defendant had only opened it two inches and put the defendant under – or the occupant under restraints before showing him the warrant. The Court held in that case that the officers acted legally under those circumstances.

Here, what you are asking me to consider is something which I don't know if it's appropriate to consider. To some extent, the issue turns on what Detective Pharo confronted in the execution of the search warrant and what he could reasonably believe under the circumstances.

Mr. Richards' testimony, to some degree, is self-serving, and to another degree, it lacks some credibility due to the fact that he bailed out the window while all of this is going on would lead someone of a suspicious nature to beleive [sic] that maybe he did not want Detective Pharo, the maintenance man, to come in because [35] he was aware that accompanying Detective Pharo, even if he was the maintenance man, was a uniformed police officer.

I think that's a fair inference to draw from – or presumption, even, to draw from the facts in this case. It's three o'clock in the morning, or thereabouts. There is a knock on the door by this individual who says he's a maintenance man. There are a number of other people standing in the hall, including the uniformed police officer, at which time, albeit the door was only open an inch and a half, but Officer Pharo, Detective Pharo observed

an expression, if you will, on the defendant's face, that the door slammed shut, the dead bolt was engaged, that at that point in time he announced who he was. He was not in fact the maintenance man. He was a police officer. And he attempted entry.

That is basically the situation in *Moss*, and they did identify themselves, albeit that the identification and the forced entry were close to each other.

The object of the search warrant is to search a premises for controlled substances. I think the Court also is permitted to draw an inference that those types of materials are easily disposable with one flush of a toilet; that under those circumstances, if Detective Pharo was searching for stolen television sets, that [36] might enter into the consideration. But the warrant here was for controlled substances, which everybody knows are easily disposable. For him to stand around in the hall forever that night, I think one could be critical of that type of conduct under the circumstances.

I think based on – I know based on the evidence that I've received that there was an attempted ruse, which did not work, which required the officer to announce. My understanding of the evidence is that he made his announcement before crossing the threshold. There is no evidence that he did not make that – that he allowed at least some opportunity for Mr. Richards to open the door, but based on Mr. Richards' own testimony, he was too busy being in the corner and then out the window.

So under the circumstances, I believe the conduct of the officer was reasonable, the execution of the search

warrant was legal, and the motion is dismissed – or denied.

* * *

CIRCUIT COURT
STATE OF WISCONSIN DANE COUNTY
BRANCH 1

STATE OF WISCONSIN, Plaintiff,	:	
-vs-	:	
STEINEY J. RICHARDS, Defendant.	:	Case No. 92-CF 124

MOTION TO SUPPLEMENT RECORD

NOW COMES the State by Assistant District attorney Judy Schwaemle and hereby moves the court to reopen testimony of the evidentiary hearing held on September 2, 1992, on defendant's Motion to Suppress – Search Warrant.

As grounds for this motion, the State maintains that the record made at the hearing is incomplete, inasmuch as officers executing the warrant were not questioned about whether or not officers announced their purpose prior to entry.

As further grounds the State incorporates the attached affidavit of Detective Richard Pharo.

Dated at Madison, Wisconsin, this 5th day of October, 1992.

Respectfully Submitted:

/s/ _____
Judy Schwaemle
Assistant District Attorney
Dane County, Wisconsin

CIRCUIT COURT
STATE OF WISCONSIN DANE COUNTY
BRANCH 1

STATE OF WISCONSIN, Plaintiff,	:	AFFIDAVIT
-vs-	:	
STEINEY J. RICHARDS, Defendant.	:	Case No. 92-CF 124

STATE OF WISCONSIN)
) ss
COUNTY OF DANE)

Richard Pharo, being first duly sworn on oath, states the following:

(1) That on December 31, 1991, prior to entry by officers to room 138 at the Ramada Inn, he heard an officer shout, "search warrant."

(2) Detective Pharo further reports that he spoke with Detective Jeff Teuscher, who informed Detective Pharo that Detective Teuscher was in fact the person who shouted, "search warrant," as police were forcing open the door to room 138.

(3) Detective Pharo states that he believes Detective Teuscher to be truthful and reliable because Detective

Pharo has relied on him on numerous previous occasions and always found him to be so.

/s/ _____
Richard Pharo

Subscribed and sworn to before me
this _____ day of October, 1992.

/s/ _____
Notary Public, Dane County, Wisconsin
My commission: _____

CIRCUIT COURT
STATE OF WISCONSIN DANE COUNTY
BRANCH 1

STATE OF WISCONSIN, Plaintiff,	:	
-vs-	:	
STEINEY J. RICHARDS, Defendant.	:	Case No. 92-CF 124

* * *

[3] THE COURT: This matter was set for jury trial today. It also is set for hearing on the State's motion to supplement record. Why don't we deal with that motion first. Ms. Schwaemle, to your motion.

MS. SCHWAEMLE: Judge, in addition to the motion that I filed, I sent to the court and copied Mr. Berman a letter somewhat – explaining somewhat further the basis for my motion. Briefly, Judge –

THE COURT: I remember reading it. I can't remember what I did with it. Here it is. Go ahead.

MS. SCHWAEMLE: Briefly, the suppression hearing in this case that was held in early September. I appeared at that time, frankly, in somewhat haste, and I failed to ask Dick Pharo what I think is a very relevant and pertinent question to make the record complete on the manner in which that search warrant was executed, and it is entirely due to my oversight in making that record. Indeed, it came to my attention as soon as the evidence was closed and I was arguing to the court and

reviewing [4] the case on which I relied at that time. It jumped out at me immediately, and, as soon as we were out of the courtroom, I asked Dick Pharo, did anyone announce – prior to entry into that room did anybody say anything about what they were doing there, and he told me, in fact, that he had heard at least one person, if not more, shout "search warrant," and it is simply by my omission that I failed to ask that question.

I ask this court to reopen that record, because the record is silent on that matter and because it's my belief that records are made in the lower court and that, when those decisions are appealed to a higher court, those decisions should be based on what, in fact, occurred – should be based on the truth. The truth is, is [sic] I understand it, that the police did announce their purpose for entry into that residence, and, because that is the truth, I ask this court to reopen the record so that truth can be made of record and so that a higher court looking at what occurred can make a decision based on the truth.

THE COURT: Mr. Berman.

MR. BERMAN: Judge, I also forwarded a letter to the court the day after I received Ms. Schwaemle's submissions, and we do strenuously oppose reopening the record at this point. I think the letter sets out my [5] grounds rather fully. Judge, our motion very, very explicitly set forth the grounds that we were challenging the execution of the search warrant at the room at the Ramada Inn. The motion expressly set out, as one of those grounds, the fact that the executing law enforcement agents, and I'm quoting now, "failed to sufficiently identify themselves and their purpose." The motion also

expressly cited the *Morales* case, which has as its holding the proposition that, when search warrants are executed, law enforcement agents must announce both their identity and their purpose, absent exceptional circumstances. The hearing itself provided ample opportunity for the one State's witness who testified to – testified as to what others may or may not have said. He was asked open-ended questions on direct, and he did not say anything about a search warrant being the purpose of the law enforcement agents on December 31st. Moreover, Mr. Richards was called to the stand. He was asked point-blank whether anyone said anything about a search warrant when the agents entered the room, and he answered on two or I believe three occasions, and I cited the page in the transcript, "no." At that point there was certainly ample opportunity for the State to call Detective Pharo or anybody else in rebuttal to say, oh, yeah, we said search warrant.

[6] Just as important as any other proposition, your Honor, I believe is the proposition that there should be some finality when evidence is closed on a hearing, and also an important doctrine of one of waiver, but I think perhaps more importantly is one of finality; that it is not a sound policy to go back after the evidence is closed on a hearing a month later and try to fill in gaps which ostensibly are in the evidence. That sort of thing invites after-the-fact fabrication, rather than the truth, to go back and look at the record and say, oh, that's not in there, well, let's go in after the fact and fill in that hole. Ms. Schwaemle indicates that she came in haste to the hearing. I suppose we all could look back at trials or hearings and wish we tried the perfect case or the perfect hearing,

but that's not the way it works. There is the position of finality and the proposition of waiver and those ought to be applied here.

I would also note in terms of haste that the notice for this hearing was sent out a full three weeks in advance of the hearing, and Ms. Schwaemle came armed with the *Moss* decision which also sets forth the proposition that – that the purpose of agents executing a search warrant should be made. I don't believe you should reopen under these circumstances, your Honor. I strenuously oppose it. I don't know of any authority for [7] it, and none is cited in the State's motion.

THE COURT: Well, I don't know that there is a great deal of authority in any – in any context on motion – any context on motions for reconsideration, but I think one of the things, obviously, that the court has to look at is what is the prejudice that attaches to the opposing party to have a full record. I don't for one minute think that, if this case would go up to the Court of Appeals, that they would have any – any hesitation at all to send it back to the trial court for further findings of fact. That is not unusual at all, especially when, as in this case, they would be put on alert that there is something of a factual – an evidentiary nature which had not been brought. I don't disagree with you, Mr. Berman, that there is some need for finality, but I am realistic enough to know that at least in the criminal area there is not much finality in anything. I constantly hear and rehear post-trial, post-conviction motions *ad nauseam*, some brought by attorneys who are representing clients, who then will bring the same motions pro se. So I don't disagree with you that there should be some finality, but, unfortunately, that

is an objective, although we strive for it, we don't seem to be able to accomplish that. Absent any prejudice, I am going to allow the State's motion. I will grant the [8] motion to supplement record.

* * *

RICHARD D. PHARO,

called as a witness, having been first duly sworn, was examined, and testifies as follows,

DIREST EXAMINATION BY MS. SCHWAEMLE:

Q Detective Pharo, could you state your full name and spell your last.

A Richard D. Pharo. The last name is spelled P-H-A-R-O.

Q Detective Pharo, I want to again direct your attention to December 31 of last year, when the warrant was executed at Room 138 of the Ramada Inn. Prior to entry into Room 138, Detective Pharo, did you announce the purpose of entry into that room?

A Personally, no.

Q Did you hear any other persons in your presence announce the purpose of entry into that room?

[9] A There were at least two other officers that I heard announce that we had a search warrant.

Q And do you recall specifically what was said or shouted?

A The words, "search warrant," was shouted along with "police."

Q Subsequent – in fact, immediately after the hearing on September 2nd, did you talk with me about that fact?

* * *

THE WITNESS: Yes, I did.

MS. SCHWAEMLE:

Q And what, if anything, did you tell me about those circumstances at that time immediately after the hearing?

A Our discussion was whether or not anyone had yelled the word "search warrant," prior to the entry into – entry into the motel room, and I advised you that I heard at least two people announce "search warrant," one of which I thought might have been Detective Teuscher.

Q Did you then inquire further from Detective Teuscher about whether in fact he had –

A Yes, later that day, when officer – or Detective Teuscher arrived at work, I discussed the incidents with [10] him and asked if he remembered announcing that we had a search warrant prior to entering the room, and he stated that he did remember distinctly.

MS. SCHWAEMLE: Thank you, Detective, that's all I have.

THE COURT: Cross-examine.

CROSS-EXAMINATION BY MR. BERMAN:

Q Detective Pharo, before entering the room at the Ramada Inn, it was kicked in, correct; the door was kicked in?

A It was forced open, yes.

Q that was by Officer Peregoy, correct?

A Yes.

Q And when in relation to the door being forced open by Officer Peregoy was the word search warrant uttered, seconds before?

A Probably. From what I recall it's when I hear the bang of the door going open.

Q And simultaneous with that you heard the word search warrant?

A Yes.

Q Who initiated the conversation between you and Ms. Schwaemle after the hearing on September 2nd?

A I think Ms. Schwaemle did.

Q You don't recall for sure?

A No.

[11] Q And other than asking you whether someone stated search warrant when the room at the Ramada Inn was being searched, what else did she ask you?

A We talked about who was there and if I remembered who may have mentioned it. I had remembered that Officer Halford was also in full military uniform, and it was my belief that Officer Halford also yelled search warrant at the time.

Q And I take it you and Ms. Schwaemle discussed why that fact was significant?

A Yes, that we had announced ourselves prior to entry into the room was discussed.

Q Had you discussed why the question of whether you announced your identity and your purpose was significant?

A There is case law stating that officers have to do that, and I also discussed the fact with Ms. Schwaemle that I was aware of the fact that we had to announce ourselves and our purpose based on past court proceedings, and that's one of the reasons why more than one person announces and states why we're there when we execute search warrants. If there are ten people executing a search warrant, I know in the past I've heard five to ten people holler search warrant as we go through the room. That was part of the discussion.

Q Now, after you testified, you remained on September [12] 2nd – you remained in the courtroom, did you not?

A For a time, yes.

Q And you remained in the courtroom while Mr. Richards testified, isn't that true?

A Yes.

Q And you heard Mr. Richards testify, did you not?

A I recall that he testified, yes.

Q And you were available at that time to be recalled as a witness, were you not, by the State?

A Yes, I was.

Q Prior to testifying on September 2nd of this year, you spoke with Ms. Schwaemle, isn't that true? Let me rephrase that. You spoke with Ms. Schwaemle about your testimony before you actually took the stand on September 2nd, isn't that correct?

A Just briefly, yes.

Q And she went over with you at that time your recollections of what occurred when the search warrant was executed at the room at the Ramada Inn, correct?

A Not completely correct. I asked Ms. Schwaemle why we were at the hearing, and I was advised it was a suppression hearing. I asked her what she wanted me to testify to, and it was something similar to what happened that evening. We didn't go over question – a question-answer type interview between the two of us.

[13] Q She told you that she was going to ask you questions about what happened at the time the search warrant was executed, correct?

A Yes.

Q And you knew you were going to be asked questions about what you saw and what you heard that evening, correct?

A Yes.

Q I suppose it was that early morning actually, correct?

A Yes.

* * *

THE COURT: Testimony is closed. I don't know that there is any need for argument, counsel. I don't know that this would – I can't conceive of any way that this supplemented testimony would change the decision that I initially made. I assume you don't wish to argue that it should, Ms. Schwaemle.

MS. SCHWAEMLE: I don't think it should change the [14] ultimate decision, no.

THE COURT: And other than make it stronger, I assume you have no –

MR. BERMAN: Judge, you know, I always have hope, but I really don't think it is going to change your decision so, no, I don't care to argue it.

* * *

CIRCUIT BRANCH #1

WISCONSIN DANE COUNTY

State of Wisconsin, Plaintiff

-vs-

STEINEY J. RICHARDS ,
Defendant

11/12/72
Defendant's Date of Birth

TYPE OF CONVICTION
(Select One)

XX Sentence to Wisconsin State Prisons

__ Sentence Withheld, Probation Ordered

__ Sentence Imposed & Stayed, Probation Ordered

COURT CASE NUMBER
92 CF 124

The defendant entered plea(s) of: [ ] Guilty [ ] Not Guilty [XX] No Contest

The [XX] Court [ ] Jury found the defendant guilty of the following crime(s):

CRIME(S)

CT 1: PROHIBITED ACTS A-PENALTIES

CT 2: IMPOSITION PENALTIES

WIS STATUTE(S) VIOLATED	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DATE(S) CRIME COMMITTED
161.41(lm)(cm)4	F		12/31/91
139.88 139.95(2)	F		On or about 12/31/91

(Filed October 12, 1992)

IT IS ADJUDGED that the defendant is convicted on 10/12/92 as found guilty and:

[XX] on 10/12/92 is sentenced to prison for CT 1: 13 YEARS, FORTHWITH, WITH CREDIT FOR 286 DAYS. CT 2: 3 YEARS, CONCURRENT WITH CT 1, WITH CREDIT FOR 286 DAYS.

[ ] on _____ is sentenced to intensive sanctions for _____

[ ] on _____ is sentenced to county jail/HOC for _____

[ ] on _____ is placed on probation for _____

CONDITIONS OF SENTENCE/PROBATION

Obligations: (Total amounts only)

Fine $_____
(includes jail assessments; drug assessments; penalty assessments)

Court costs $_____
(includes service fees; witness fees; restitution surcharge; domestic abuse fees; subpoena fees; automation fees)

Attorney fees $_____
Restitution $_____

Other $_____

Mandatory victim/witness surcharge(s)

felony _____ counts
$_____

misdemeanor _____ counts
$_____

Jail: To be incarcerated in the county jail/HOC for

_____

_____

Confinement Order For Intensive Sanctions sentence only – length of term: _____

Miscellaneous

Court imposed $25,000FI + 5000PA + 15,000DG + 20FE + 50VW + 250JA = $45,320.00 (CT 1); $50VW (CT 2) TOTAL = $45,370.00-TO BE PAID DURING TERM OF SENTENCE.

IT IS ADJUDGED that ___ days sentence credit are due pursuant to s. 973.155 Wis. Stats. and shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of WAUPUN, DODGE CORRECTIONAL INSTITUTION .

NAME OF JUDGE
ROBERT A. DECHAMBEAU

Illegible ATTORNEY
JUDY SCHWAEMLE, ADA

DEFENSE ATTORNEY
MORRIS BERMAN

BY THE COURT:

/s/ Loreen C. Redepenning
Clerk/Deputy Clerk

10/12/92
Date Signed

COURT OF APPEALS
DECISION
DATED AND RELEASED

March 3, 1994

NOTICE

No. 93-0391-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEINEY J. RICHARDS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

SUNDBY, J. In this warranted drug search and seizure case, defendant Steiney J. Richards relies on our decision in *State v. Stevens*, 173 Wis.2d 290, 496 N.W.2d 201 (Ct. App. 1992). Because the Wisconsin Supreme Court reversed our decision, *State v. Stevens*, No. 92-1557-CR (Wis. Feb. 8, 1994), and created a "drug house (exception to the "knock and announce" rule which applies here, we affirm the judgment of conviction and the order denying Richards' motion to suppress evidence of drugs seized in the search of his motel room.

At 3:40 a.m. on December 31, 1991, police officers executed a warrant to search Richards' motel room. Richards does not claim that the police had failed to establish probable cause to obtain a warrant to search his room for drugs. The sole issue he raises is whether, when their attempt to gain entry through a ruse failed, the police were required to comply with the "knock and announce" rule.

In *Stevens*, the Wisconsin Supreme Court adopted a "blanket" "drug house" rule. *Stevens*, slip op. at 15. The court concluded that, "where the police have a warrant to search the property, the residents retain only a very limited interest in privacy. The warrant authorizes the police to enter the residence and search for evidence pursuant to the search warrant." *Id.* at 17. The court further explained that "the societal interest in stopping the drug trade, combined with the police officers' safety interest, outweigh[s] the occupants' limited privacy interests." *Id.* at 18. The *Stevens* court concluded that that privacy interest is protected by the probable cause requirement which must be met before a warrant may be issued to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs. *See id.* at 9-10. When that probable cause requirement is met, the police may execute a warrant to search a private residence for drugs without first knocking and announcing their presence and purpose.

Under the "drug house" exception, the officers' search of Richards' motel room was reasonable and did not violate his limited right of privacy.

By the Court, – Judgment and order affirmed.

Not recommended for publication in the official reports.

STATE of Wisconsin, Plaintiff-Respondent,

v.

Steiney J. RICHARDS, Defendant-Appellant-Petitioner.

Supreme Court

No. 93-0391-CR. Oral argument April 3, 1996. – Decided June 12, 1996.

(Affirming 183 Wis. 2d 429 (table), 516 N.W.2d 19 (Ct. App. 1994).)

(also reported in 201 N.W.2d 839)

REVIEW of a decision of the Court of Appeals. *Affirmed.*

For the defendant-appellant-petitioner there were briefs and oral argument by *David R. Karpe,* Madison.

For the plaintiff-respondent the cause was argued by *Stephen W. Kleinmaier,* Assistant Attorney General, with whom on the brief was *James E. Doyle,* Attorney General.

WILLIAM A. BABLITCH, J. Steiney J. Richards (Richards) seeks review of a decision of the court of appeals affirming his conviction for possession of cocaine base with the intent to deliver. Richards argues that because the police failed to "knock and announce" prior to entering his motel room to execute a search warrant, any evidence seized must be suppressed. The issue is simply stated: whether the Fourth Amendment allows a blanket exception to the general requirement of "knock and announce" (the rule of announcement) for entries into premises pursuant to a search warrant for evidence of felonious drug delivery. We conclude that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery: an extremely

high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police.[1] The public interests inherent in these circumstances far outweigh the minimal privacy interests of the occupants of the dwelling for which a search warrant has already been issued. Accordingly, we re-affirm *State v. Stevens*, 181 Wis.2d 410, 511 N.W.2d 591 (1994), *cert. denied*, 115 S.Ct. 2245 (1995), and conclude that police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery.[2]

As a prefatory note, we took this case to examine the continuing validity of *Stevens* in light of the recently decided U.S. Supreme Court case of *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995). We conclude that *Stevens* remains valid. In *Stevens*, this court adopted a blanket exception to the rule of announcement in cases involving a search

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[1] The concurrence's position would, in many instances, place the police in situations of great personal risk. It makes neither good law nor good sense. Despite the overwhelming evidence across the country of the inherent dangerousness of these situations, the concurrence would deny the police the right to forego "knock and announce" unless the police had specific information about the dangerousness of the drug house to be searched and specific information about the dangerousness posed by its occupants. Thus, in those cases in which such specific information is unavailable, the concurrence would force the police into the untenable position of subjecting themselves to extremely high risks detailed in this opinion. We decline to follow the concurrence's invitation.

[2] We use the phrase "felonious drug delivery" to mean felonious delivery of drugs or felonious possession with intent to deliver drugs in violation of Subchapter IV, Wis.Stat. §§ 161.41, 161.42 and 161.43.

warrant for felonious drug delivery. *Wilson*, decided subsequently to *Stevens*, held that the rule of announcement forms part of the Fourth Amendment reasonableness inquiry. The Court in *Wilson* left it to the lower courts to determine the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We proceed to do so now.

The dispositive facts for purposes of this appeal can be stated succinctly: on December 31, 1991, police executed a search warrant for the motel room of the defendant seeking evidence of the felonious crime of Possession with Intent to Deliver a Controlled Substance in violation of Wis.Stat. § 161.41(1m) (1991-92).[3] They did not knock and announce prior to their entry. Drugs were seized.

The circuit court denied Richards' motion to suppress. Richards subsequently entered pleas of no contest to the felony of possession of cocaine base with the intent to deliver, Wis.Stat. § 161.41(1m), and a tax stamp violation, Wis.Stat. § 139.95(2).[4] The court found him guilty

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[3] All future statutory references will be to the 1991-92 volume unless otherwise indicated. Wis.Stat. § 161.41(1m) provides in relevant part:

(1m) Except as authorized by this chapter, it is unlawful for any person to possess, with intent to manufacture or deliver, a controlled substance.

[4] Wisconsin Stat. § 139.95(2) states, in relevant part:

(2) A dealer who possesses a schedule I controlled substance or schedule II controlled substance that does not bear evidence that the tax under s. 139.88 has been paid may be fined not more than $10,000 or imprisoned for not more than 5 years or both.

and sentenced him to 13 years imprisonment on the possession with intent count and three years concurrent imprisonment on the tax stamp count. Richards appealed. The court of appeals upheld the circuit court's ruling, relying on *Stevens*. Richards filed a petition for review which we granted.

The sole issue before this court is whether the Fourth Amendment to the United States Constitution[5] allows a blanket exception to the general requirement of "knock and announce" for entries into premises pursuant to a search warrant for evidence of felonious drug delivery. This is a question of law that we review without deference to the lower courts. *State v. Betterley*, 191 Wis.2d 407, 416-17, 529 N.W.2d 216 (1995).

Richards summarizes the issue in one sentence: "The blanket 'drug house' exception to the 'knock and announce' rule violates the Fourth Amendment's reasonableness requirement." Richards contends that the U.S. Supreme Court decision in *Wilson* forbids blanket rules regarding search and seizure because the reasonableness of each search must be examined on a case-by-case basis. The State of Wisconsin (State) argues that *Wilson* does not forbid blanket rules and, under *Wilson*,

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[5] Amendment IV of the United States Constitution states: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

the blanket rule announced in *Stevens* is still valid. We agree with the State.

The Fourth Amendment to the United States Constitution and Wisconsin Constitution art. I, § 11 protect the security of people "in their persons, houses, papers, and effects against unreasonable searches and seizures." While this court may interpret Wis. Const. art. I, § 11 more strictly than the United States Supreme Court interprets the Fourth Amendment, it has consistently and routinely conformed the law of search and seizure under the Wisconsin Constitution to the law developed by the United States Supreme Court under the Fourth Amendment. *State v. Williams*, 168 Wis.2d 970, 981, 485 N.W.2d 42 (1992); *see State v. Guzman*, 166 Wis.2d 577, 586-87, 480 N.W.2d 446 (1992).

The Fourth Amendment proscription against unreasonable searches and seizures not only requires that there be probable cause to undertake the search or make the seizure but also that the search or seizure be conducted in a reasonable manner. *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985). The rule of announcement, which requires police officers seeking to enter a dwelling in the execution of a search warrant to announce their identity and allow time for the door to be opened voluntarily, addresses the manner in which a legitimate governmental intrusion is to take place. *Williams*, 168 Wis.2d at 981. The rule of announcement has a common law heritage and serves three primary justifications: (1) protecting the individual's privacy in the home; (2) decreasing the potential for violence by alerting the resident that the officer is legitimately on the premises; and (3) preventing the physical

destruction of property by giving the resident the opportunity to admit the officer voluntarily. *Id.* at 981-82. Under certain circumstances, a search is reasonable under the Fourth Amendment even if the police dispense with the rule of announcement and execute a no-knock entry. *Wilson,* 115 S.Ct. at 1918-19; *see also Stevens,* 181 Wis.2d at 423. The knock and announce rule may be excused if "exigent circumstances" exist to justify the no-knock entry. *United States v. Singer,* 943 F.2d 758, 762 (7th Cir.1991). Exigent circumstances " 'include a reasonable belief that announcement of police presence would endanger the safety of the police or others, or a reasonable belief that unannounced entry is required to prevent the destruction of evidence.' " *Williams,* 168 Wis.2d at 982 (citations omitted).

These "exigent circumstances" formed the basis of our decision in *State v. Stevens.* In *Stevens,* we held that when the police have a search warrant, supported by probable cause, to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs, they necessarily have reasonable cause to believe exigent circumstances exist. *Stevens,* 181 Wis.2d at 424-25. We reasoned that the rationale behind the rule of announcement was no longer valid in today's drug culture. "In fact, by announcing their presence, police may actually increase the likelihood for violence." *Id.* at 428. When the police execute a search warrant for evidence of drug delivery, there is reasonable cause to believe both that drugs will be destroyed and evidence lost, and that the occupants of the residence will be armed. *Id.* at 432. Therefore, a no-knock search is reasonable any time the police have a warrant, supported by probable cause, to

search a residence for "evidence of drug dealing." *Id.* The limited privacy interests of the individual were balanced against two other governmental interests: the public's substantial interest in stopping or at least curtailing the drug trade and its related crimes, and the police officers' interest in protecting themselves and others from harm. *Id.* This court concluded:

> When the police execute a search warrant for evidence of delivery of drugs or evidence of possession with intent to deliver, there is reasonable cause to believe both that the drugs will be destroyed and evidence lost and that the occupants of the residence will be armed . . . Even when the police dispense with the entire knock and announcement, the societal interest in stopping the drug trade, combined with the police officers' safety interest, outweigh the occupants' limited privacy interests.

Stevens, 181 Wis.2d at 432.

Richards contends that the practical effect of *Stevens* is a flat rule which cannot be valid given the level of intrusion and the fact that too much discretion is allowed to police officers. Richards argues that the blanket exception to the knock and announce rule is inconsistent with the U.S. Supreme Court's decision in *Wilson.*

In *Wilson,* the defendant challenged a police entry into her home pursuant to a search warrant authorizing a search for evidence of drugs and drug paraphernalia. The defendant's suppression motion alleged that the police violated the common law principle requiring them to knock and announce their presence and authority before entering. The U.S. Supreme Court held that whether the

officers knock and announce their presence and authority before entering a dwelling as required by the common law "forms a part of the Fourth Amendment reasonableness inquiry." *Id.* at 1916. The Court, however, noted that not all unannounced entries are unreasonable. "[L]aw enforcement interests may also establish the reasonableness of an unannounced entry." *Id.* at 1919. The Court stated:

> This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. As even petitioner concedes, the common-law principle of announcement was never stated as an inflexible rule requiring announcement under all circumstances.

Id. at 1918. The Court recognized that under certain circumstances, the presumption in favor of announcement necessarily gives way to contrary considerations. These contrary considerations include the threat of physical harm to the police, the pursuit of a recently escaped arrestee, or the belief that evidence will likely be destroyed. *Id.* The Court stated:

> We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.

Id. at 1919.

Richards argues that the blanket "drug house" exception to the knock and announce rule adopted by this court in *Stevens* is no longer viable in light of *Wilson*. Richards further contends that *Wilson* requires a reasonableness analysis to be performed for every unannounced search and seizure. We disagree.

In *Stevens*, this court did not announce a blanket rule doing away with the common law rule of announcement. Instead, we adopted a narrow exception to the general rule: when police have a search warrant to search a premises for evidence of felonious drug delivery, they do not have to knock and announce. When police have probable cause to support a search warrant for evidence of felonious drug delivery, the potential for dangerousness to the police and the potential for the destructibility of evidence is so great as to overcome the general rule. The very facts supporting probable cause to believe that drugs and drug dealers are present in a dwelling also lead to the reasonable belief that exigent circumstances exist. In sum, we conclude that exigent circumstances are always present when a search warrant for evidence of felonious drug delivery is executed.[6]

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[6] The State's brief argues extensively concerning the "level of justification" the Fourth Amendment requires before the police can legally make an unannounced entry to execute a search warrant for evidence of drug dealing. The State argues that the proper level of justification for a no-knock entry is a reasonable suspicion that an announcement would endanger the safety of the officers and/or occupants, or a reasonable suspicion that an announcement would result in the destruction of evidence.

Wilson does not forbid blanket rules; rather, it requires such rules to be supported by the standard of "reasonableness." The Court left it to the lower courts to determine "the circumstances under which an unannounced entry is reasonable under the Fourth Amendment." *Wilson*, 115 S.Ct. at 1919.

The reasonableness of a search generally turns on whether it was conducted pursuant to a valid warrant. *U.S. v. U.S. District Court*, 407 U.S. 297, 309-10, 314-15 (1972). In deciding whether a particular police practice is reasonable, the Court has repeatedly said that the importance of the public interests must be weighed against the nature of the intrusion upon Fourth Amendment rights. *Maryland v. Buie*, 494 U.S. 325, 332 (1990). The Court stated that the balancing of these competing interests is " 'the key principle of the Fourth Amendment.' " *Garner*, 471 U.S. at 8 (citation omitted).

We balance these competing interests by looking first to the public interests involved when police execute a search warrant for felonious drug delivery. Law enforcement officers have a substantial interest in being able to secure the site so that it may be searched promptly,

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We need not address what level of justification is necessary in this case. Here, we are dealing with the particular circumstances of a search warrant for evidence of felonious drug delivery. Our holding is based on the assumption that drug dealers will have weapons and pose a danger to officers, and that drug dealers will destroy evidence or at least attempt to destroy evidence after announcement by the police. Therefore, because exigent circumstances are always present, we do not address the issue concerning what level of justification is needed for a no-knock entry. This issue must be left to a case in which drugs are not involved.

efficiently and safely. The success of police in searching for evidence and instrumentalities of drug dealing depends on their ability to establish command of the scene quickly and to secure the safety of themselves, the occupants and the place to be searched. Note, D. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant Is an Idea Whose Time Has Come,* 64 Notre Dame L.Rev. 552, 553 (1989) [hereinafter Allegro].

Police officers face an unquantifiable risk of violence every time they go into a house to execute a search warrant.[7] The Court has recognized the unique danger

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[7] The following represents only some of the recent newspaper articles documenting the escalating violence police face each day:

> A man was killed, and a Columbus police officer was slightly wounded last night during a drug raid. It was the second time this year that officers have been wounded in Near East Side Raids.

Erin Marie Medick, Man Slain, *Swat Officer Wounded Shootings Came in Near East Side Raid,* The Columbus Dispatch, Mar. 15, 1996.

> Designed to serve search warrants on crack houses, the Columbus Police Division's investigative and tactical unit is trained to enter homes where the risk of retaliation and gunfire is high. . . . The shooting occurred after police announced – as required by law – that they would be coming into the house, said Lt. William McKendry of the division's narcotics squad.

Alice Thomas, *Drug Raids Becoming Riskier For Police,* The Columbus Dispatch, Jan. 19, 1996.

> Interviews with police officers and a ballistics study will be used to determine who shot an Omaha police officer when police burst into a home to make an arrest Tuesday night, police said.

police officers face in suspects' houses because the officers are coming onto their adversaries' "turf" which has a

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Angie Brunkow, *Origin of Shot That Hit Officer Sought*, The Omaha World-Herald, Mar. 1996.

> Police raided what they said was a family-run drug house early Saturday morning and then went into the drug business for a few hours. . . . Police confiscated 105 bags of heroin worth $2,600, about $5,000 worth of crack cocaine and six guns.

Karen Henderson, *Raid-Sting at Drug House Leads to 10 Arrests*, The Plain Dealer, Feb. 12, 1996.

> At least seven kinds of illegal drugs worth about $50,000, four guns and $36,500 in cash were seized by police when they raided a Spring Township house Wednesday morning, according to officials. . . . "This is the kind of thing we're used to finding, this and a lot more," he said, gesturing to an illegal sawed-off 12-gauge shotgun and a TEC-DC9 9mm semiautomatic pistol with a 30-bullet clip.

Steven Reinbrecht, *Police Raid Spring Twp. House, Confiscate Drugs, Guns and Cash*, Reading Eagle, Reading Times, Feb. 15, 1996.

> A SWAT team leading a force of more than 100 officers Wednesday raided an apartment building that police said had been turned into a fortress by drug dealers. . . . "There were armed guards at all entrances to the building, armed internal patrols 24 hours a day. All the key players were in constant contact with each other with hand-held radios." . . . That drug dealers could control an entire building in a city like Racine shows that "the drug thing is all over the place," Higgins said. "It doesn't matter how big the city is. This is like a nest."

Ann Bothwell, *SWAT Force Raids Racine Drug House*, The Milwaukee Journal, Jan. 29, 1992.

configuration unknown to the officers. In *Maryland v. Buie*, 494 U.S. 325 (1990), the Court acknowledged that:

> The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or road-side investigatory encounter . . . [A]n in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

Id. at 333.

As one commentator notes, the risk that police must face is greatly increased by a knock and announce requirement:

> [A] police officer making a high-risk warrant entry is at a severe disadvantage. When he announces authority and purpose he makes himself readily identifiable. The suspect, concealed inside a house, will generally be able to see the officer, or know where the officer is since he is most often near the door. Even if the officer can see occupants inside the house, he does not know if they intend to resist unless they are naive enough to reveal their violent intentions. The officers are most vulnerable when entering the house. If the announcement has given the [suspect] time to arm himself, all he needs to do is aim his firearm at the door and wait for a target to appear.

Allegro, at 566 (footnotes omitted).

These risks are only heightened when drugs are involved.[8] The connection between drugs and weapons has been well documented by appellate courts. *Michigan v. Summers*, 452 U.S. 692, 702 (1981); *Stevens*, 181 Wis.2d at 420, 428-29; *Williams*, 168 Wis.2d at 984-85; *United States v. Kennedy*, 32 F.3d 876, 882 (4th Cir.1994) ("[T]he law has uniformly recognized that substantial dealers in narcotics possess firearms and that entrance into a situs of drug trafficking activity carries all too real dangers to law enforcement officers."); and *State v. Harris*, 384 S.E. 2d 50, 53 (N.C. App. 1989). The connection between drugs and weapons establishes that it is more than a possibility that guns will be found at the location that is the subject of a search warrant for drug dealing. Reporting on a study which concluded that drug dealers and gang members are the criminals most likely to use guns, an article in the New York Times noted:

> It is drug dealers, rather than drug users, who use guns, Professor Decker said, because they are usually carrying valuable quantities of drugs and large amounts of money and need the protection of a gun more than ordinary users.

Fox Butterfield, *Study Discounts the Role of Drug Users in Gun-Related Crime*, N.Y. Times, Oct. 8, 1995, at 36.

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[8] Statistics indicate that drug related violence is a growing contributor to police mortality. From 1977 to 1986, of the police officers murdered, 6.5 percent, or 57 of 875, were killed in situations involving drug matters. In 1985, 7.6 percent of police murders were drug related, and in 1986, 10.6 percent of police murders involved drug matters. Federal Bureau of Investigation, Crime in the United States: Uniform Crime Reports (statistics extracted from annual reports from 1977-1986). *See* Allegro at 570, n. 32.

The study revealed that, among arrestees who admitted selling illegal drugs in the past year, 25 percent reported they carried a gun all or most of the time. *Arrestees and Guns: Monitoring the Illegal Firearms Market,* National Institute of Justice, Research Preview, September 1995. The results of this study show that the likelihood of finding guns during the execution of a search warrant for drug dealing is "more than a possibility." The 25 percent figure in the study relates only to arrestees; and among arrestees it reflects only the admitted use of guns. The use of guns by all drugs dealers is certainly higher than the use reflected in that study. Nevertheless, even using the 25 percent figure in the study, "requiring police to knock and announce their identity before executing all search warrants for drug dealing would be tantamount to requiring the police before each warrant execution to play Russian roulette with a four-chamber gun." (Respondent's brief at 23).

When suspects resist the police with firearms, officers face serious disadvantages.[9] Allegro, at 554. They are

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[9] Firearms claimed the lives of 92 percent of the officers killed in the line of duty from 1977 through 1986. Seventy percent of the murders were committed by the use of handguns, 13 percent by rifles, and 9 percent by shotguns. U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted 4 (1986).

Nationwide, an average of 17 of every 100 law enforcement officers were assaulted in 1986, an increase of 7 percent from 1985. During the year, 64,259 line-of-duty assaults were reported by 9,755 law enforcement agencies covering approximately 81 percent of the total United States population. These agencies employed a total of 380,249 officers. *Id.* at 41.

easily identified by spoken commands and uniform, while assailants may be difficult or impossible for the officers to see. *Id.* An assailant may determine when and where to shoot, and if he has time to prepare to resist, it takes him only half a second to fire an accurate shot from a cocked gun. *Id.* The police officer must evaluate whether the situation justifies use of deadly force, typically requiring evaluation of a series of factors, and if his or her gun is holstered, it takes him or her one to 1.2 seconds to draw and return fire. *Id.* at 554-55.

When an officer confronts a suspect who has a firearm in hand, in 40 percent of the cases the suspect will fire, will usually fire first, and will often shoot with a ballistically superior weapon. R.J. Adams & T.M. McTernan, *Street Survival: Tactics for Armed Encounters* 35 (1980). Police shootings almost invariably occur at close range and are over almost instantly.[10] Allegro, at 555.

> In the vast majority of cases, the officer is ten feet or less from the assailant. Normally, the initial exchange of gunfire is determinative, with most confrontations over in two to three seconds with no more than a total of three shots fired. Almost half the time, an officer will face

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Nearly 22,000 law enforcement officers were reported to have received personal injuries resulting from their assaults. *Id.*

[10] In almost half of the cases, the officer is five feet or less away. Of the more than 250 police officer murders in New York City from 1854 to 1980, the assailant was more than 20 feet away when he fired in only one case. See S. Chapman, *Cops, Killers and Staying Alive: The Murder of Police Officers in America* 21 (1986) (noting that from 1972-1984, 52.4 percent of officers murdered were zero to five feet from their assailants and 20.6 percent were six to ten feet away).

> multiple assailants. While the assailants will fire without regard to bystanders, the officer must accommodate their presence.

Id. at 555 (footnotes omitted).

In *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981), the Court recognized that the "risk of harm to both the police and the occupants [of an area subject to a search] is minimized if the officers routinely exercise unquestioned command of the situation." The sooner the officers have complete control of the situation, the less likely it is that any confrontation between suspects and officers will escalate to the point of gunfire. Minimizing this risk, in turn, ensures the safety not only of the officers, but also of suspects and of innocent bystanders.

All of this points to the need for officers to control the scene immediately, not only for their own safety and the safety of others, but also to seize evidence of felonious drug delivery. After all, a search warrant commands officers to go to a particular place to seize evidence of drugs and drug paraphernalia. In *Stevens*, we recognized that the "easily disposable nature of narcotics provides police with evidence sufficient to form a reasonable belief that no-knock entry is necessary to prevent the destruction of evidence." *Stevens*, 181 Wis.2d at 425. If officers must knock and announce their authority and presence, they provide the occupants of the house with the opportunity not only to arm themselves, but to dispose of the evidence involving drugs.

Allowing police to take command of the situation is thus vital to the safe and effective execution of a search

warrant for evidence of felonious drug delivery. Moreover, the officers executing a search warrant are in the best position to decide how to take command of the situation. In some cases, police officers will undoubtedly decide that their safety, the safety of others, and the effective execution of the warrant dictate that they knock and announce; in other cases, they might decide that such a procedure would be counterproductive or even dangerous. "In cases like this, where the police have a valid warrant, supported by probable cause, to search a home for 'evidence of drug dealing,' the officers executing the warrant have the incentive to choose the safest method of entry." *Stevens*, 181 Wis.2d at 430. It is constitutionally reasonable to allow officers in the field to decide what course of action to pursue instead of requiring them to "take unnecessary risks. . . . " *Terry v. Ohio*, 392 U.S. 1, 23-24 (1968); *see also Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (stating that the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are often tense, uncertain, and rapidly evolving. . . . ").

We now weigh these public interests of dangerousness and disposability against the individual's interest in having notice that a search warrant is about to be executed in a few short seconds. Richards argues that he has privacy interests in keeping the police outside of his dwelling until the police "knock and announce." Although we acknowledge that privacy interests in the home are fundamental, we also conclude that these interests are not sufficient to elevate Richards' privacy interests over the public's interest in having police officers

safely and effectively execute a search warrant for evidence of felonious drug delivery.

Richards' privacy interests are only slightly advanced by a knock and announce rule. Although Richards correctly notes that people normally have the highest expectation of privacy in their homes, this argument is largely irrelevant in this case. There is no dispute that within a matter of seconds after the police arrived with a search warrant, they were entitled to enter Richards' dwelling, with or without permission, and conduct as thorough a search as was reasonably necessary. The search had been authorized by a neutral magistrate, and would have occurred regardless of whether the police knocked and announced their presence.

> It is difficult to see, however, what actual protection is given to any right of privacy by the announcement rule. Once identity and purpose are stated, entry must always be permitted; if permission is denied, or even delayed for an inordinate amount of time, entry may be forced, provided the officer has a valid purpose in gaining admission. Since no discretion is vested in the occupant, in what manner does notice protect his privacy? . . .
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> Thus balanced, the protections to privacy seem to be somewhat tenuous when compared to the potential for public harm. This is particularly true with respect to potential destruction of evidence, especially when one considers that the probable cause requirement would have to be met in any event.

Sonnenreich and Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 St. John's L.Rev. 626, 647 (1970).

Here, the disruption of privacy interests is almost entirely attributable to the valid warrant, not the unannounced entry. "[W]here the police have a warrant to search the property, the residents retain only a very limited interest in privacy." *Stevens*, 181 Wis.2d at 432. In *Stevens*, we stated that:

> Even under the rule of announcement, after the police have announced their identity and purpose, the occupants must let them in within a reasonable time or the police may force their way in. The occupants' privacy interests are limited to knowing the police are entering and perhaps effecting the method of entry. The occupants do not have the right to refuse entry.

Id.

When we compare these limited privacy interests to the substantial interest the public has in allowing the police to safely and effectively execute a search warrant, the balance overwhelmingly favors the public interest.

Police have widely regarded narcotics enforcement as a particularly dangerous area of police work for some time. However, beginning in the early 1980's, the hazards to police officers escalated. Street gangs, spawned by decay in America's cities, and already known for their propensity for irrational violence, entered the drug business on a major scale.[11] In the 1960's and 1970's, the

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[11] Street gangs have been documented in cities in the United States throughout most of the country's history, but

police confronted and adjusted to a higher level of violence.

When the risks of law enforcement change radically, the rules by which courts regulate the police should reflect those changes. Therefore, we conclude that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery. The public interests in these circumstances far outweigh the minimal privacy interests of the occupants of the dwelling for which a search warrant has already been issued. Accordingly, we re-affirm *Stevens* and conclude that

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accounts by the media, practitioners, and some researchers suggest that gangs are now posing a more serious crime problem than in the past. U.S. Department of Justice, National Institute of Justice, *Street Gangs: Current Knowledge and Strategies* 1 (1993). And while reports conflict about the extent to which gangs play an organized role in drug trafficking, recent research suggests that gang members are highly visible in the drug trade. *Id.*

In addition, it is easy for gang members to obtain weapons.

> It's real easy (for teenagers to get guns). You just have to have the money, and know somebody who can get one. Most gang members have . . . it's probably related to a drug dealer. They contact the drug dealer and tell him, "I pay so much for a gun." He'll say "OK, I'll sell it to you." A . 12 gauge sawed-off would run, like, about 50 to 90 bucks. Nobody really ever buys a gun over 50 unless its a fully-automatic. . . . One of the main interests when someone (a gang member) breaks into a house [is] to look for guns or money. Really the guns they want to look for.

Catherine H. Conly, *Hearing Summary of the National Field Study on Gangs and Gang Violence in Dallas, Texas*, Revised Draft Report (Washington D.C.: National Institute of Justice, December 1991), at 13.

police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery. The decision of the court of appeals is affirmed.

By the Court. – The decision of the court of appeals is affirmed.

SHIRLEY S. ABRAHAMSON, J. (*concurring*). On the basis of the facts found by the circuit court I conclude, as does the majority, that the entry executed against the defendant was reasonable under the Fourth Amendment. I write separately because I conclude that the majority's reaffirmation of the blanket exception to the knock-and-announce rule first decreed in *State v. Stevens*, 181 Wis.2d 410, 511 N.W.2d 591 (1994), *cert. denied*, 115 S.Ct. 2245 (1995),[1] fails to satisfy the Fourth Amendment's reasonableness requirement delineated by the United States Supreme Court in *Wilson v. Arkansas*, 115 S.Ct. 1914, 1918 (1995).

Wilson made clear that there is a "presumption in favor of announcement," 115 S. Ct. at 1918, but that the "Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of

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[1] In *Stevens*, the court examined the facts of the case and concluded that they provided a reasonable basis for the law enforcement officers' unannounced entry. The *Stevens* court then proceeded to create a blanket rule that law enforcement officers need never comply with the knock-and-announce rule when the police have probable cause through a search warrant for evidence of delivery of drugs or evidence of possession of drugs with intent to deliver. *Stevens*, 181 Wis.2d at 435. The holding in *Stevens* jettisoned longstanding Wisconsin case law interpreting and applying the knock-and-announce rule.

announcement that ignores countervailing law enforcement interests." 115 S. Ct. at 1918. Law enforcement interests – including the threat of physical harm to law enforcement officers or the existence of reason to believe that evidence would likely be destroyed if advance notice were given – may establish the reasonableness of an unannounced entry. *Id.* at 1919.[2] The burden is on the prosecution to show exigent circumstances excusing the no-knock entry. *Id.*

By reaffirming *Stevens* and declaring that neither findings of fact nor a determination of reasonableness are necessary in any case involving a search warrant of the premises of a drug dealer, today's majority opinion ignores the Court's instructions in *Wilson*. The majority also ignores the Court's "long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application" because "each case is to be decided on its own facts and circumstances." *Ornelas v. United States*, No. 95-5257, WL 276414 1996 at *5 (U.S. May 28, 1996) (quoting *Ker v. California*, 374 U.S. 23, 33 (1963)). Moreover, and also in contradiction to what *Wilson* teaches, the majority opinion's reasoning logically leads to the complete abandonment of the knock-and-announce rule in every case involving the execution of a search warrant.

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[2] The Court held "that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." *State v. Wilson*, 115 S.Ct. 1914, 1919 (1995).

I.

The blanket exception embraced by the majority today cannot be squared with the *Wilson* decision. Under *Wilson*, the courts rather than law enforcement officers are charged with determining whether the facts and circumstances of a particular search comply with the Fourth Amendment's command that such a search be reasonable. *Wilson*, 115 S. Ct. at 1919.

The action taken by the Arkansas high court after the *Wilson* case was remanded from the United States Supreme Court provides an illustrative contrast with the action taken by the majority today. The Arkansas Supreme Court summarily remanded to the trial court even though the facts in *Wilson* provided significantly stronger grounds than are present in this case for recognizing an exigent circumstances exception to the knock-and-announce rule. In *Wilson*, evidence that the accused was a drug dealer included an actual purchase of drugs made by a police informant. Further, the accused had brandished a semi-automatic weapon while threatening to kill an informant if she worked for the police, while the accused's housemate had previously been convicted of arson and firebombing.

The Arkansas Supreme Court's reluctance to draw legal conclusions prior to the trial court's initial determination of whether a no-knock entry at issue was reasonable – despite strong evidence indicating that it was – contrasts sharply with this court's sweeping conclusion that *all* no-knock entries in cases involving drug dealers are, *ipso facto*, reasonable. Instead of "mak[ing] any necessary findings of fact and . . . mak[ing] the determination

of reasonableness" which *Wilson* requires,[3] the majority instead concludes that under current social conditions

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[3] Prior to executing the search warrant against the defendant in this case, the police knew that the defendant had previously been arrested for the possession of 63 packets of cocaine. Furthermore, after the defendant had checked out of another hotel, the police had found clear plastic sandwich bags like the ones used in packaging cocaine. Finally, information obtained from an informant demonstrated that the defendant and his companions had engaged in conduct that matched a drug courier profile, including paying in cash, refusing room service, and making and receiving numerous phone calls from their room.

While the circuit court found that these facts were sufficient to establish probable cause for a search warrant, it found them insufficient to justify a no-knock warrant and therefore rejected the request for a no-knock warrant.

When the police proceeded to execute the warrant, additional circumstances came into play. When the police first sought entry through a ruse, with one officer posing as a maintenance man, the defendant opened the door and then rapidly shut it again. The state and the defendant dispute whether the defendant recognized that the "maintenance man" was a police officer, as well as whether he saw the fully uniformed police officer standing to the right of the "maintenance man." The circuit court characted the defendant's testimony as self-serving and apparently accepted the officers' statement of what had happened.

Under these circumstances, compliance with the knock-and-announce-rule would constitute a "useless gesture." It has long been recognized "that notice is not required when it is evident from the circumstances that the authority and purpose of the police is already known to those within the premises." 2 Wayne R. LaFave, *Search and Seizure* § 4.8(f), at 620 (3d ed. 1996) (collecting cases); *see also State v. Berry*, 174 Wis.2d 28, 32, 496 N.W.2d 746 (Ct.App.1993) (when law enforcement officers hold

exigent circumstances are always present in the execution of search warrants involving felonious drug delivery.[4]

Had either the United States Supreme Court in *Wilson* or the Arkansas Supreme Court upon remand subscribed to a version of the blanket exception announced by the majority today, they need not have remanded for findings of fact and a determination of reasonableness, because there was no question but that the accused in *Wilson* was dealing drugs, owned a gun, and had threatened to use it. Both courts, however, declined the opportunity to announce a blanket rule such as the rule embraced today by the majority.[5]

Hence it is not surprising that federal and state courts (in addition to the Arkansas Supreme Court) which have had occasion to interpret and apply *Wilson*

---

a "reasonable belief that compliance with the rule" of announcement "would be a useless gesture," they need not comply with it).

[4] The majority might more appropriately have heeded Justice Scalia's recent reminder that the purpose of the Fourth Amendment requirement of reasonableness "is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted – even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (Scalia, J., concurring).

[5] According to the accused's reply brief in *Wilson* filed with the United States Supreme Court by the defendant, the state and all of the amici supporting the state's position sought a blanket rule exempting drug searches from the reach of the knock-and-announce rule. Reply Brief for Petitioner, *Wilson v. Arkansas*, No. 94-5707, 1995 WL 120155, at *11 (U.S. Mar. 17, 1955).

have also conducted fact-specific, case-by-case analyses in determining whether no-knock entries made in executing drug-related warrants had met the Fourth Amendment's requirement of reasonableness.[6] The majority

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[6] *See, e.g., United States v. Murphy*, 69 F.3d 237, 242-43 (8th Cir.1995), *cert. denied*, 116 S.Ct. 1032 (1996) (no-knock entry to execute search warrant on drug manufacturer's premises reasonable under *Wilson*; no-knock entries are reasonable when "particular facts regarding the premises to be searched" and "circumstances surrounding the execution of the warrant" establish exigent circumstances; police informed that accused sometimes carried a weapon, that weapons were on premises, that accused had a violent past and that accused was on parole from a second-degree murder conviction); *State v. Wilson*, 899 F.Supp. 521, 529 (Kan.1995) (no-knock entry to execute search warrant for crack cocaine upheld; determination of reasonableness required by *Wilson* requires that "officers had particular reasons to believe that exigent circumstances existed"; "reasonableness inquiry focuses on what particular facts regarding the premises" were known to officers at the time); *State v. Moore*, 535 N.W.2d 417 (Neb. Ct. App. 1995) (no-knock entry to execute search warrant on drug dealer's premises unreasonable under *Wilson*; given amount of marijuana to be seized, police believed it would be difficult to destroy it quickly; no evidence that the suspect was armed or dangerous); *State v. Vargas*, 910 P.2d 950 (N.M. Ct. App. 1995) (no-knock entry to execute arrest warrant against drug traffickers was reasonable; while fact that defendants were suspected of trafficking in drugs and of possessing weapons was not itself enough to excuse compliance with rule of announcement, review of the record revealed additional evidence of defendants' violent tendencies and thereby established reasonableness of a no-knock entry); *State v. Ordonez-Villanueva*, 908 P.2d 333 (Or.Ct.App. 1995) (no-knock entry to execute search warrant for controlled substances reasonable under *Wilson*; informant had previously seen controlled substances which might be easily destroyed if police complied with the knock-and-announce rule); *State v.*

opinion cites no cases – and I have found none – supporting its interpretation of *Wilson*.

Finally, the majority cites no United States Supreme Court case eliminating the requirement that officers be able to point to specific, articulable and individualized facts justifying their actions in each case. None of the cases cited by the majority relieves the state in Fourth Amendment cases from the requirement that officers' actions in a particular case be subject to meaningful judicial review to determine whether their actions are "objectively reasonable." *See, e.g., Terry v. Ohio*, 392 U.S. 1, 21-22 (1968); *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981); *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). While I

Mastracchio, 672 A.2d 438, 443 (R.I. 1996) (question of whether no knock entry to execute search warrant on drug dealer's premises was reasonable remanded to circuit court; although state alleged that no-knock entry was justified to preserve officers' safety and prevent destruction of evidence, circuit court had not made the requisite factual findings and determination of reasonableness); *Hargrave v. Commonwealth*, 464 S.E. 2d 176, 179 (Va. Ct. App. 1995) (no-knock entry to execute search warrant for drugs unreasonable under *Wilson*; although the object of the search was drugs, police did not have particularized suspicion that evidence could or would be readily destroyed).

See also United States v. Jewell, 60 F.3d 20, 23-24 (1st Cir.1995) (*Wilson* requires a determination of whether an affidavit presented in support of an application for a no-knock warrant describes circumstances establishing that a no-knock entry would be reasonable); *United States v. Conley*, 911 F.Supp. 169, 172 (W.D. Pa.1995) ("based on the teachings in *Wilson*, the Court believes that the circumstances of each factual situation should be considered by the Court in determining whether the unannounced entry is unreasonable under the Fourth Amendment").

recognize that "[t]he calculus of reasonableness must embody allowances for the fact that police officers are often forced to make split-second judgments," *Graham*, 490 U.S. at 397, it nevertheless is crucial that those judgments be assessed according to an "objective standard" by a detached and neutral judge. *Terry*, 392 U.S. at 21-22.

In allowing law enforcement officers rather than the courts to make the ultimate determination of whether a particular search has been conducted reasonably, the majority has ignored the United States Supreme Court's admonition that "[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge *who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.*" *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (emphasis added).

II.

The majority opinion characterizes its blanket exception as "a narrow exception to the general rule" requiring a knock-and-announce entry. Majority op. at ___. The majority's reasoning, however, leads inexorably to the conclusion that the police need never knock and announce and that their decision is not reviewable. As a result, the exception the majority opinion sets forth swallows the rule of announcement.

According to the majority, "[p]olice officers face an unquantifiable risk of violence every time they go into a house to execute a search warrant." Majority op. at ___. I

agree with this assessment. Forty-two percent of America's 96.4 million households have some kind of firearms. Twenty-four percent of the households have pistols, 27% have shotguns and 23% have rifles.[7] The federal Bureau of Alcohol, Tobacco and Firearms estimates that there are approximately 200 million firearms in the nation, about one per person.[8] As the majority opinion points out, firearms claimed the lives of 92% of the law enforcement officers killed in the line of duty between 1977 and 1986.

According to the reasoning of the majority, then, the large number of firearms in this country and the large percentage of deaths of officers caused by firearms would create a compelling need to eliminate the knock-and-announce rule in all search warrant entries; the probability that one or more of the occupants of any premises has access to a gun would, *ipso facto*, establish exigent circumstances making a no-knock entry reasonable.

Perhaps aware that its evidence pertaining to firearms proves far too much, the majority attempts to distinguish the dangers associated with executing search warrants related to drugs from the dangers accompanying the execution of any search warrant by claiming that the "risks are only heightened when drugs are involved." Majority op. at ___. However, the crime statistics cited by the majority do not support the contention that "drug

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[7] Brief for Petitioner, *Wilson v. Arkansas*, No. 94-5707, 1995 WL 39036, at *42 n. 49 (Ark. Jan. 24, 1995) (citing Statistical Abstract of the United States (1992), Tables 409 & 702).

[8] *See State v. Williams*, 168 Wis.2d 970, 992, 485 N.W.2d 42 (1992) (Abrahamson, J., concurring).

related violence is a growing contributor to police mortality." Majority op. at ___ n.8.

As I set forth in my concurrence to *Stevens*, 181 Wis.2d at 448 n.18, the total number of officers killed on duty declined from 1978 to 1991, as did the number of officers killed in arrest situations involving drug-related matters. Fewer officers (9 officers/4.3 percent) were murdered as a consequence of drug-related violence from 1992-94 than in the periods from 1978-81, 1982-86, or 1987-91.[9] From 1978-94 about twice as many officers were killed in traffic pursuits or stops as were killed in arrest situations involving drug-related matters.[10] During the same years, more officers were killed while answering disturbance calls for family quarrels than were killed in arrest situations involving drug-related matters.[11] The one officer killed in Wisconsin in 1995 was answering a domestic disturbance call.

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[9] U.S. Dept. of Justice Hindelang Criminal Justice Research Center, *1994 Sourcebook of Criminal Justice Statistics* at 357.

[10] The total number of law enforcement officers killed in traffic stops or pursuits was 184, while 94 were killed in disturbance calls for family quarrels and 91 were killed in arrest situations involving drug-related matters. During the period 1992-1994, 10 officers were killed in 1992 and 1993, respectively, and 9 were killed in 1994 while engaged in traffic pursuits or stops; during the same years, 3 officers were killed each year in arrest situations involving drug-related matters. *Id.*

[11] *Id.* The number and percentage of officers killed while handling or transporting prisoners in custody doubled between the period 1978-81 and 1987-91. *Id.*

What I stated in my concurrence to *Stevens* remains true today: while the death or injury of even one law enforcement officer is one too many, the empirical evidence cited does not support the majority's rationale that executing search warrants in drug cases is more dangerous to officers than other activities. *Stevens*, 181 Wis.2d at 449 (Abrahamson, J., concurring). If anything, those statistics argue that if law enforcement officers may dispense with the knock-and-announce rule in drug-related cases, they should be able to dispense with it altogether. Conversely, what *Wilson* teaches is that law enforcement officers may not dispense with the rule of announcement unless they can establish, on a case-by-case basis, that exigent circumstances justify an exception to the rule of announcement and render a no-knock entry reasonable under the Fourth Amendment.

The majority opinion rests on the premise that a knock-and-announce rule increases the likelihood of violence against law enforcement officers. In those cases, a rule of reasonableness would enable the officers to enter without announcement. In many other instances, however, law enforcement officers may expose themselves and other individuals to unnecessary violence when they do not announce their presence.[12]

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[12] Both the brief federal experience with no-knock entries as well as numerous recent newspaper articles indicate the often lethal risks that no-knock entries can pose to both law enforcement officers and the individuals whose homes they enter.

As I explain in my concurrence to *Stevens*, 181 Wis.2d at 447-48, a 1970 federal statute authorizing no-knock warrants was repealed only four years later, following numerous highly

Rather than affirming the sweeping blanket exception to the knock-and-announce rule first advanced in

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publicized no-knock raids in which terrified citizens, imagining that intruders were entering their homes, discovered instead that the "intruders" were law enforcement officers entering without notice. The statute, which was described by one senator as "an invitation to official lawlessness," provoked numerous newspaper articles recounting the details of various no-knock raids; more than 100 of them were reproduced in the *Congressional Record*. In Virginia, a woman who had previously been burglarized shot and killed a young officer who, executing a no-knock warrant, entered her bedroom in the middle of the night; in California, a father was shot through the head in his living room as he cradled his infant son. Both the woman and the man were innocent of any wrongdoing. *See* 119 *Cong. Rec.* 15,170-76 (1973) (collecting articles); 119 *Cong. Rec.* 23,242-58 (same); *see also* Charles Patrick Garcia, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 Colum.L.Rev. 685, 704-05 (1993) (describing unfortunate incidents resulting from no-knock raids undertaken in accordance with the 1970 federal statute).

For more recent accounts of injuries to officers and innocent victims in no-knock drug entries, *see, e.g.*, Alan Abrahamson, *Nightmare of Shots in the Dark*, L.A. Times, Dec. 12, 1992, at 1 (U.S. drug agents acting on bad tip failed to identify themselves before making forcible entry; occupant, who thinks he is being robbed, shoots and wounds agent and is himself shot in leg, arm, shoulder and lung; no drugs found); James Bovard, *No-Knock Entries by Police Take Their Toll on Innocent*, Christian Science Monitor, May 24, 1994, at 18 (no-knock drug raids are frequently mistakes; describes, *inter alia*, no-knock entry in Stockton, CA, in which a 63-year-old homeowner killed a police officer and was then himself killed, although no drugs were found); Hipolito R. Corella, *Police Admit SWAT Team Raided Wrong Home*, Arizona Daily Star, July 29, 1993, at B1 (police crashed through window and detonated stun grenade in townhouse whose inhabitants included three children under

Stevens. I would heed the instructions of the *Wilson* Court and assess the reasonableness of the no-knock entry in this case on the basis of the facts presented. The court's decision today ignores *Wilson*, dispenses with longstanding Fourth Amendment jurisprudence requiring the assessment of reasonableness in each particular case, and may place the very law enforcement officers it purports to protect in greater peril. We should have availed ourselves today of the opportunity to correct our mistake in *Stevens*. Instead we have compounded it.

For the reasons set forth, I concur in the judgment.

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five and 75-year-old woman; owner dialed 911 and was told by the dispatcher that "the masked men screaming orders at frightened members of his family were police officers"); Toni Locy, *Police Admit Error, Apologize for Fatal Raid*, Boston Globe, Mar. 27, 1994 at 1 (in a drug raid, police make no-knock entry in wrong apartment, chasing 75-year-old minister, who suffered a fatal heart attack as a result); Sam Stanton, Cops' *Deadly Mistakes in All-Out War on Drugs*, San Francisco Examiner, Feb. 7, 1993 (no-knock drug raids often executed against wrong house, "and the tension involved in facing the unknown can lead to trouble"; describes three incidents involving innocent victims of no-knock entries).

SUPREME COURT OF THE UNITED STATES

No. 96-5955

Steiney Richards,

Petitioner

v.

Wisconsin

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Wisconsin.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, February 11, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 7, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, March 18, 1997. Rule 29.2 does not apply.

January 3, 1997

(6)

Supreme Court, U.S.
FILED
FEB 11 1997
CLERK

No. 96-5955

In The

Supreme Court of the United States

October Term, 1996

STEINEY J. RICHARDS,

Petitioner,

v.

THE STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Wisconsin

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Fourth Amendment, as interpreted by *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), permit a court to uphold police noncompliance with the rule of announcement without looking to the particular circumstances of the entry if the police have a warrant to search for drugs?

II. Does the Fourth Amendment, as interpreted by *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), permit a blanket exception to "knock-and-announce" if drugs are the object of a search warrant?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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CITATIONS OF OPINION BELOW

The March 3, 1994 opinion of the Wisconsin Court of Appeals in the direct appeal is unreported. (J.A. 73-75) It is listed in the table at 183 Wis. 2d 429, 516 N.W.2d 19 (1994).

The petition for review was granted by the Wisconsin Supreme Court, the state's highest court, and its opinion affirming the judgment was rendered June 12, 1996. *State v. Richards*, 201 Wis. 2d 839, 549 N.W.2d 218 (1996). (J.A. 76-109)

BASIS FOR JURISDICTION

The jurisdiction of this court lies under 28 U.S.C. § 1257(a). The judgment of the Wisconsin Supreme Court was entered June 12, 1996. The petition was filed September 10, 1996, and it was granted January 3, 1997.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the U.S. Constitution provides in § 1 that:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law,. . . .

STATUTES INVOLVED

Wis. Stats. § 968.14 (1989-90):

Use of force

> All necessary force may be used to execute a search warrant or to effect any entry into any building or property or part thereof to execute a search warrant.

Other statutes on Wisconsin search warrants involved appear in Appendix A. They are:

(a) Searches and seizures, when authorized; Wis. Stats. § 968.10 (1989-90);

(b) Search warrant provisions; Wis. Stats. § 968.12 (1989-90);

(c) Property subject to seizure under search warrants; Wis. Stats. § 968.13 (1989-90); and

(d) Effect of technical irregularities; Wis. Stats. § 968.22 (1989-90).

STATEMENT OF THE CASE

A. Introduction

The case involves Wisconsin's drug case blanket exception to the Fourth Amendment's knock-and-announce requirement of *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995).

Prior to *Wilson*, the Wisconsin Supreme Court held in *State v. Stevens*, 181 Wis. 2d 410, 511 N.W.2d 591 (1994), *cert. denied*, 115 S.Ct. 2245 (1995),[1] that the nature of the "drug culture" permitted Wisconsin police to dispense with the knock-and-announce requirement in drug cases. *Id.* at 425, 511 N.W.2d at 596. The Wisconsin court stated, in summary, *id.* at 424-25, 511 N.W.2d at 595:

> We hold that when the police have a search warrant, supported by probable cause, to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs (evidence of drug dealing), they necessarily have reasonable cause to believe exigent circumstances exist. Thus, in all such searches the police are justified in dispensing with the rule of announcement and making a no-knock entry. (footnote omitted)

Richards' appeal arrived first at the Wisconsin Court of Appeals where his conviction was affirmed based on *Stevens*. (J.A. 73-75) This decision is unreported and appears in the table at 183 Wis. 2d 429, 516 N.W.2d 19 (1994).

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[1] *Stevens* was pending before this Court for several months, and the Court denied certiorari eight days after *Wilson* was decided.

Petitioner requested review in the Wisconsin Supreme Court to determine whether *Wilson* affected its ruling in *Stevens*. The Wisconsin Supreme Court granted review and affirmed June 12, 1996, finding that the knock-and-announce exception for evidence of drug dealing was constitutional under *Wilson*. *State v. Richards*, 201 Wis. 2d 839, 549 N.W.2d 218 (1996). (J.A. 76-109)

B. Facts

This case arises from a drug raid on Room 138 of the Ramada Inn in Madison, Wisconsin at 3:40 a.m.,[2] December 31, 1991. The officers did not knock-and-announce in making their entry.

According to the warrant application (J.A. 2-8), during the week of December 22, 1991, Officer Richard Pharo of the Dane County, Wisconsin Metro Narcotics Unit,[3] learned from a citizen informant that at least four black male drug dealers from Detroit were staying at Motel 6 on Thierer Road in Madison. (*Id.* 4). The informant described one as being in his twenties, approximately 5'9" and well over 200 pounds. (*Id.* 5) Officer Bill Murphy and the management at Motel 6 confirmed that four black males were staying in at least two different rooms at Motel 6. These men frequently refused maid service, paid cash for their rooms, and made and received numerous

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[2] Wisconsin law permits a search warrant to be served at any time of day or night without specific authorization required for nighttime service. *See State v. Seyferth*, 134 Wis. 2d 354, 397 N.W.2d 666 (Ct.App.1986). *See* Fed.R.Crim.P. 41(c)(1).

[3] The drug unit actually has a longer name, but this is what Pharo called it in the affidavit for the search warrant. (J.A. 3)

phone calls. (*Id.*) In Pharo's experience, these activities were consistent with drug dealing. (*Id.*)

On December 28, 1991, Officer Murphy learned the four men had checked out of their rooms at Motel 6. (*Id.* 6) He removed from one of their abandoned rooms a box of clear sandwich baggies. (*Id.*)

Detective Pharo learned that Steiney Richards was the name of one of the men registered at Motel 6. (*Id.*) Richards' address was listed by the motel as 11415 Sorrello, Detroit, Michigan. (*Id.*) Murphy contacted the Detroit Police Department and learned that a 5'9" 280 pound black male named Steiney Richards living at 11415 Sorrento had been arrested in January 1991 in possession of 63 packets of cocaine. (*Id.*)

Detective Pharo went to the Ramada Inn and learned that Richards had checked into Room 138 in the early morning hours of December 28, 1991, paying cash in advance for the rent through January 4, 1992. (*Id.* 7) Richards gave an address this time of Laro 11415, Detroit. The management informed Detective Pharo that Richards had made at least 51 outgoing calls from the room. (*Id.*)

Pharo prepared an affidavit and search warrant for Richards' hotel room based on all this as his probable cause. Pharo went to a judge to get his warrant signed. The judge specifically determined that the circumstances presented in the affidavit did not justify a "no-knock" warrant, so he struck the paragraph of the affidavit

requesting it and the clause of the warrant which would have authorized it.[4] (*Id.* 7, 9, 42)

Pharo gathered other officers and went to Room 138 of the Ramada Inn. Pharo was dressed in a Ramada Inn maintenance man's shirt in a ruse to get in the room without use of force. (*Id.* 27, 40) With him was an officer in "full military uniform" (*id.* 38), two or three in uniform (*id.* 39), and two plainclothes officers. (*Id.*) Some others were to hide in the room across the hall. (*Id.*)

The raid party came to the door and knocked. (*Id.* 38) Standing three or four feet to Pharo's right was the officer in "full military uniform" and to his left the uniformed officers. (*Id.* 39) The peephole was covered. (*Id.* 46)

Richards asked "Who is it?", and Pharo said "Maintenance man." Apparently not understanding, Richards asked, "Who?", and Pharo said again "Maintenance man." (*Id.* 42, 46) Richards unlocked and opened the still-chained door about an inch or an inch and one-half and peeked out. (*Id.* 43) His field of vision permitted him to see Pharo and the officer in the military uniform. (*Id.* 38-39) When Richards felt the door being pushed in, he shut and locked it. (*Id.*)

Pharo testified that Richards had a look of surprise,[5] which indicated to Pharo that Richards must have seen

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[4] Wis. Stats. § 968.12 (1989-90) neither specifically authorizes nor prohibits no-knock warrants. No-knock warrants issued by Wisconsin state judges are valid. *United States v. Singer*, 943 F.2d 758, 759 n. 1 (7th Cir. 1991).

[5] Who would not be "surprised" to encounter unexpected visitors in janitor and combat garb at the door at 3:40 a.m.?

the officer in the military uniform. (*Id.* 38, 40) Pharo said as he reached for the doorknob, Richards shut the door and locked it.[6] (*Id.* 39, 41) After a wait of about "two or three seconds," officers announced "police officers" and began to kick the door down, but it did not give way easily.[7] (*Id.* 39-41) Finally, the door gave way when an officer rammed it with his shoulder (*Id.* 39). As the door was opening, Pharo heard glass breaking. (*Id.*)

Pharo testified that during the break-in, officers said they were police officers maybe twice. (*Id.* 39-40)[8] Richards testified that he heard no one say anything about being a police officer until he was outside the window and an officer yelled "Police, freeze!" which he did. (*Id.* at 47)

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[6] Merely shutting the door does not prove that Richards knew what the people outside his door wanted. *See Miller v. United States*, 357 U.S. 301, 310 (1958):

> But, first, the fact that petitioner attempted to close the door did not of itself prove that he knew their purpose to arrest him. It was an ambiguous act. It could have been merely the expected reaction of any citizen having this experience at that hour of the morning, particularly since it does not appear that the officers were in uniform. . . . and the answer "Police" was spoken "in a low voice" and might not have been heard by the petitioner so far as the officers could tell.

[7] Anyone who has stayed in a hotel or motel in the last thirty years knows that they have heavy wooden fire resistant doors in metal frames. They will not easily give way.

[8] At the supplemental hearing on October 12, 1992, Pharo added that an officer said "Police; search warrant," simultaneously with the bang of the door crashing open. (J.A. 64-66).

During the search of Room 138, officers found hidden over the bathroom ceiling tile two plastic bags. One contained $3,000 in cash, and the other contained cocaine base, including about 120 small packets of rock cocaine. (*Id.* 20-21) Nothing was in plain view.

C. The Proceedings in the Trial Court

On February 4, 1992, petitioner was charged with drug offenses: one count of possession of cocaine with intent to deliver in violation of Wis. Stats. § 161.41(1m)(cm)4 and one count of possession of cocaine without a tax stamp in violation of Wis. Stats. §§ 139.88 & 139.95(2). (*Id.* 33)

Petitioner moved to suppress the search on the ground that the officers failed to knock-and-announce. (*Id.* 35-36) On September 9, 1992, the trial court held a suppression hearing, after which the court denied the motion, finding that the officers had cause to suspend announcement. (*Id.* 55) The trial court found that the issue turned on the circumstances confronted by the officers at the time of execution of the warrant, and what the officers could reasonably believe under the circumstances. (*Id.* 54) Further, the trial judge found that the fact that Richards had "bailed out the window" would "lead someone of a suspicious nature to beleive [sic] that maybe he did not want Detective Pharo, the maintenance man, to come in because he was aware that accompanying Detective Pharo, even if he was the maintenance man, was a uniformed officer." (*Id.*) The trial court found that the officers properly identified themselves upon the failure of the ruse to gain peaceable entry, "albeit that the

identification and the forced entry were close to each other." (*Id.* 55) Since this was a warrant to search for drugs, easily flushed down the toilet, the trial court found that the officers conducting the search were justified in not waiting longer following the identification of themselves as police officers before knocking in the door. (*Id.*) The police announced their identity before crossing the threshold. (*Id.*) There was at least some opportunity for Richards to open the door, but he "was too busy being in the corner and then out the window." (*Id.*). In conclusion, the court declared the officers' conduct reasonable and the search legal. (*Id.* 55-56)

The prosecutor filed a motion to supplement the record on October 5, 1992, on the ground the record was incomplete because the officers allegedly did announce that they had a search warrant. (*Id.* 57) On October 12, 1992, the court adduced further testimony from Detective Pharo, who testified that somebody said "search warrant." (*Id.* 64) On cross-examination, he admitted the announcement was simultaneous with the breaking. (*Id.* 66) The trial court stated that the additional testimony did not change the ultimate conclusion. (*Id.* 69)

Immediately thereafter, petitioner then pled no contest in a negotiated and conditional guilty plea[9] to thirteen years imprisonment; thirteen years on the drug charge and three years concurrent on the tax stamp[10] charge. (*Id.* 71)

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[9] Conditional pleas are permitted in Wisconsin. Wis. Stats. § 971.31(10).

[10] The Wisconsin Supreme Court ruled last month that the tax stamp statute is unconstitutional on self-incrimination grounds in *State v. Hall*, 1997 WL 24508 (Wis. Jan. 8, 1997).

D. The Decision Being Reviewed

Petitioner appealed to the Wisconsin Court of Appeals contending that the search of his room was unconstitutional under *State v. Stevens*, 173 Wis. 2d 290, 496 N.W.2d 201 (Ct.App.1992). (J.A. 73) While his case was pending, however, on February 4, 1994, the Wisconsin Supreme Court reversed the part of the appellate court opinion in *Stevens* he was relying on. *State v. Stevens*, 181 Wis. 2d 410, 511 N.W.2d 591 (1994), *cert. denied*, 115 S.Ct. 2245 (1995). So, on March 3, 1994, the Court of Appeals affirmed Richards' conviction relying on the " 'blanket rule' " of *Stevens* dispensing with knock-and-announce under a "'drug house' exception." (J.A. 73, 74) (The decision was not published. It appears in the table at 183 Wis. 2d 429, 516 N.W.2d 19 (1994).)

Petitioner sought review in the Wisconsin Supreme Court to consider whether the "blanket rule" of *Stevens* was constitutional under *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995). That court granted review, but reaffirmed *Stevens* under *Wilson* and held that today's "drug culture" and the risks to police associated with executing search warrants permitted it to find that such a blanket rule was constitutional under *Wilson*. *State v. Richards*, 201 Wis. 2d 839, 549 N.W.2d 218 (1996). (J.A. 76-109)

Unlike the trial court, the Wisconsin Supreme Court held that there had been no legal announcement, summarizing the facts thusly, 201 Wis. 2d at 843, 549 N.W.2d at 220 (J.A. 78-79):

> The dispositive facts for purposes of this appeal can be stated succinctly: on December 31, 1991, police executed a search warrant for the

> motel room of the defendant seeking evidence of the felonious crime of Possession with Intent to Deliver a Controlled Substance in violation of Wis. Stat. § 161.41(1m) (1991-92). They did not knock and announce prior to their entry. Drugs were seized.
>
> The circuit court denied Richards' motion to suppress. Richards subsequently entered pleas of no contest to the felony of possession of cocaine base with the intent to deliver, Wis. Stat. § 161.41(1m), and a tax stamp violation, Wis. Stat. § 139.95(2). The court found him guilty and sentenced him to 13 years imprisonment on the possession with intent count and three years concurrent imprisonment on the tax stamp count. Richards appealed. The court of appeals upheld the circuit court's ruling, relying on *Stevens*. Richards filed a petition for review which we granted.

Further, *id.* at 844, 511 N.W.2d at 220 (J.A. 79-80):

> Richards summarizes the issue in one sentence: "The blanket 'drug house' exception to the 'knock-and-announce' rule violates the Fourth Amendment's reasonableness requirement." Richards contends that the U.S. Supreme Court decision in *Wilson* forbids blanket rules regarding search and seizure because the reasonableness of each search must be examined on a case-by-case basis. The State . . . argues that *Wilson* does not forbid blanket rules and, under *Wilson*, the blanket rule announced in *Stevens* in still valid. We agree with the State.

The court found that there is a risk of violence anytime officers serve search warrants in felony drug delivery cases, and this is a weighty public interest that

overcomes the individual's right of privacy once a magistrate has determined that a search warrant can issue. Indeed, the court determined that officers are at greater risk when they announce, particularly in drug cases. *Id.* at 850-52, 549 N.W.2d at 223-24 (J.A. 85-87). The court quoted a *New York Times* article stating:

> It is drug dealers, rather than drug users, who use guns, Professor Decker said, because they are usually carrying valuable quantities of drugs and large amounts of money and need the protection of a gun more than ordinary users.

Fox Butterfield, "Study Discounts the Role of Drug Users in Gun-Related Crime," The New York Times, Oct. 8, 1995, at 36. *Richards, supra,* at 853, 549 N.W.2d at 224 (J.A. 89). The court also quoted from crime statistics of officer-involved shootings. *Id.* at 854-44, 549 N.W.2d at 224-25 (J.A. 90-93).

The court also held that the nature of drug cases makes its "blanket rule" amenable to apply to the destruction of evidence exception to the knock-and-announce requirement, *id.* at 856-57, 549 N.W.2d at 225 (J.A. 92-93):

> All of this points to the need for officers to control the scene immediately, not only for their own safety and the safety of others, but also to seize evidence of felonious drug delivery. After all, a search warrant commands officers to go to a particular place to seize evidence of drugs and drug paraphernalia. In *Stevens*, we recognized that the "easily disposable nature of narcotics provides police with evidence sufficient to form a reasonable belief that no-knock entry is necessary to prevent the destruction of evidence."

> *Stevens*, 181 Wis. 2d at 425. If officers must knock-and-announce their authority and presence, they provide the occupants of the house with the opportunity not only to arm themselves, but to dispose of evidence involving drugs.
>
> Allowing police to take command of the situation is thus vital to the safe and effective execution of a search warrant for evidence of felonious drug delivery. Moreover, the officers executing a search warrant are in the best position to decide how to take command of the situation. In some cases, police officers undoubtedly decide that their safety, the safety of others, and the effective execution of the warrant dictate that they knock and announce; in other cases, they might decide that such a procedure would be counterproductive or even dangerous.

The court held that the issuance of a search warrant substantially dilutes the privacy interest in the home. " '[W]here the police have a warrant to search the property, the residents retain only a very limited interest in privacy.' *Stevens*, 181 Wis. 2d at 432." *Richards, supra*, at 858, 549 N.W.2d at 226 (J.A. 95).

Finally, *id.* at 860, 549 N.W.2d at 227 (J.A. 96-97):

> When the risks of law enforcement change radically, the rules by which courts regulate the police should reflect those changes. Therefore, we conclude that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery. The public interests in these circumstances greatly outweigh the minimal privacy interest of the occupants of the dwelling for which a search

warrant has already been issued. Accordingly, we re-affirm *Stevens* and conclude that police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery.

Thus, petitioner's conviction was affirmed.

SUMMARY OF THE ARGUMENT

I. "Physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed." Therefore, the Fourth Amendment imposes the highest scrutiny.

Drug raids are significant events. Officers break down the door with battering rams, and they sometimes even throw in stun grenades. A multitude of police swarm in wearing bulletproof vests, their weapons drawn and pointed.

The Wisconsin Supreme Court's view is based on a *de minimis* view of this invasion of privacy, and this is fundamentally and constitutionally wrong. The privacy interests in the knock-and-announce rule are much more than slightly advanced by announcement, contrary to the Wisconsin court's view.

II. *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), held that the common law rule of announcement is a part of the Fourth Amendment. The "underlying command of the Fourth Amendment is always that searches and seizures be reasonable." *Id.* at 1916.

The Wisconsin Supreme Court's reasoning is based on false assumptions of fact. Drug dealers are not better

armed and trained for assault than officers. The lower court relied on meaningless statistics regarding officer deaths. In fact, in the past 14 years, only 23 officers died in drug raids, none of whom died in Wisconsin. As many citizens died from gunfire in the course of such raids. Innocent persons suffer mistaken raids constantly, and sometimes they die. There are no real remedies for such police mistakes.

ARGUMENT

I. "IT IS AXIOMATIC THAT 'PHYSICAL ENTRY INTO THE HOME IS THE CHIEF EVIL AGAINST WHICH THE WORDING OF THE FOURTH AMENDMENT IS DIRECTED.' " ACCORDINGLY, HIGHER STANDARDS MUST APPLY.

A. There is a higher standard of privacy in the home.

The resolution of the question in this case starts from the premise that this case involves a dwelling, and dwellings are entitled to the highest scrutiny under the Fourth Amendment, which provides that "[t]he right of the people to be secure in their . . . houses . . . shall not be violated." "[T]he sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

The maxim that "every man's home is his castle" is part of the common law and the Fourth Amendment. "From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest." *Miller v. United States*, 357 U.S. 301,

306-07 (1957). *See Wilson v. Arkansas*, 115 S.Ct. 1914, 1916-17 (1995). The "right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993) (bracketed material added).

Also, the Fourth Amendment protects more than just privacy. As Justice Story stated in his commentaries, the Fourth Amendment was designed to protect "personal security, personal liberty and private property." *J. Story, Commentaries On The Constitution Of The United States*, § 1902 (2d ed.1851). *See Soldal v. Cook County*, 506 U.S. 56, 62 (1992) (the Fourth Amendment "protects property as well as privacy").

It matters not that the place searched here was merely a motel room; the Fourth Amendment protects Room 138 at the Ramada Inn in Madison as much as it protects a fashionable home in Georgetown or Beverly Hills, or on Park Avenue in New York City. *United States v. Johnson*, 333 U.S. 10 (1948); *United States v. Jeffers*, 342 U.S. 48 (1951); *Stoner v. California*, 376 U.S. 483 (1964). If it has walls and people can stay there,[11] it is protected by the Fourth Amendment.

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[11] Even a tent has Fourth Amendment protection. *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir.1994); *Alward v. State*, 112 Nev. 141, 912 P.2d 243 (1996). And let us not forget the often quoted statement of William Pitt: "Every man's house is his castle. The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement!" *See, e.g., Miller v. United States*, 357 U.S. at 307 n.7.

As *Payton v. New York*, 445 U.S. 573, 589 (1980) instructs:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. (bracketed material added)

Thus, the Court has repeatedly held that "It is axiomatic that 'physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)); *Payton v. New York, supra*, at 584-85; *Michigan v. Summers*, 452 U.S. 692, 700 n. 13 (1981); *New York v. Harris*, 495 U.S. 14, 18 (1990); *Maryland v. Buie*, 494 U.S. 325, 341 (1990).

B. A drug raid is a significant constitutional event.

A drug raid is no small invasion of privacy. Oftentimes, a horde of officers enter with guns drawn, sometimes even lobbing stun grenades in first, shouting at the occupants and usually threatening shooting or death as the penalty for non-compliance. *See, e.g., Jenkins v. Wood*, 81 F.3d 988 (10th Cir. 1996). Everyone's adrenaline is pumping. People get killed, citizens and police, both accidentally and on purpose. The invasion of a home by force like this is substantial; indeed, police argue that they must quickly and decisively secure the premises by an "unannounced dynamic entry" to protect themselves. They strive to catch the occupants off-guard and secure the premises before the occupants figure out what is happening. The state argued this below, and the Wisconsin court accepted it, referring to events occurring many years earlier and using a second-year law student's note as the impetus to justify dispensing with the common law. *Richards*, 201 Wis. 2d at 850, 549 N.W.2d at 223 (J.A. 85-86) (Note, Donald B. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant Is An Idea Whose Time Has Come*, 64 Notre Dame L.Rev. 552 (1989)); *see also State v. Stevens, supra*, at 420, 428-29, 511 N.W.2d at 593, 597.

The officers strive for control, and it works, both at the time of the search and long after. Consider the comments of Judge Fernandez of the Ninth Circuit:

> The fear of a smashing in of doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families. Indeed, the minions of

> dictators do not kick in doors for the mere purpose of satisfying some voyeuristic desire to peer around and then go about their business. Something much more malevolent and dangerous is afoot when they take those actions. It is that which strikes terror into the hearts of their victims. The fourth amendment protects us from that fear as much as it protects our privacy. . . .

United States v. Becker, 24 F.3d 1537, 1540 (9th Cir.1994) (quoting *United States v. Lockett*, 919 F.2d 585, 592 (9th Cir.1990) (Fernandez, J., concurring)).[12]

This Court has already recognized that the nature of the invasion in a drug raid is substantial and of no small consequence. *Miller v. United States, supra*, at 307-08; *Ker v. California*, 374 U.S. 23, 49-53 (1963) (Brennan, J., concurring in part and dissenting in part); *Wilson v. Arkansas, supra*, at 1916-17.

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[12] The concern that the Framers had with warrants embraced a concern with houses, which encapsulated still deeper concerns. Many commentators on the proposed Constitution were deeply fearful of the manner in which the Constitution would permit federal power to invade their hearths. Open your front door, it was reasoned, and the extent of federal invasion will be infinite. The "daring brutality of the intruders will extend to the wife of thy bosom . . . the most delicate parts of our families . . . the most discrete recesses . . . private papers . . . private concerns." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791* (1990) (unpublished PhD dissertation, Claremont Graduate School) at 1546-47.

C. The Wisconsin view is premised on a *de minimis*, and, therefore, erroneous, view of privacy interests in the home after a warrant issues. Even a drug raid suspect retains rights during a search.

The Wisconsin court considered the householder's interest to be substantially devalued once a search warrant issues. "Richards' privacy interests are only slightly advanced by a knock and announce rule." *Richards, supra,* at 857, 549 N.W.2d at 226 (J.A. 94). And, " 'where the police have a warrant to search the property, the residents retain only a very limited interest in privacy.' " *Id.* at 858, 549 N.W.2d at 226 (J.A. 95) (quoting *Stevens, supra,* 181 Wis. 2d at 432, 511 N.W.2d at 591). This evinces an attitude that one's rights in property after a search warrant issues are *de minimis* at best. This is fundamentally and constitutionally wrong.

The right to knock-and-announce is not a right easily cast aside by stating that "privacy interests are only slightly advanced by a knock and announce rule." Knock-and-announce is a valuable and important right that is supposed to protect both the lives of the participants to the search and privacy and property rights of the householder. After all, a person's home is his castle. *Wilson v. Arkansas, supra,* at 1916; *Maryland v. Buie, supra,* at 329; *Payton v. New York, supra,* at 596; *Ker v. California, supra,* at 47; *Miller v. United States, supra,* at 307.

In *Wilson v. Arkansas* this court held that the common law of knock-and-announce was a part of the Fourth Amendment and stated:

> Our own cases have acknowledged that the common law principle of announcement is "embedded in Anglo-American law," *Miller v. United States*, 357 U.S. 301, 313, 78 S.Ct. 1190, 1198, 2 L.Ed.2d 1332 (1958), but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold. Given the long-standing common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

Wilson v. Arkansas, supra, at 1918. *Wilson* creates a presumption in favor of announcement, but *Richards* creates a presumption against it. *Wilson* must prevail.

The proper explanation of the constitutional event known as execution of a search or arrest warrant is much more limited than the Wisconsin court recognizes. As stated in *Maryland v. Buie*, 494 U.S. 325, 330 (1990):

> "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Payton v. New York*, 445 U.S. 573, 602-603 (1980).

A citizen "open[s] his doors to the officers" and does not surrender all privacy to them. Once lawfully on the premises, the officers are entitled to conduct a search

incident to arrest of the area in the house for officer protection and prevention of destruction of evidence; *e.g., Chimel v. California,* 395 U.S. 752, 755-60 (1969); or a protective sweep to protect against attack from other possible confederates. *Maryland v. Buie, supra.* There is no *carte blanche* to search the whole house, everywhere and anywhere the officers want to go. *Arizona v. Hicks,* 480 U.S. 421 (1978) (moving a stereo to record serial numbers during an emergency entry was impermissible).

II. THE KNOCK-AND-ANNOUNCE RULE AND THE VALUES IT INCORPORATES.

A. The knock-and-announce rule in the Supreme Court.

In 1995, this Court held in *Wilson v. Arkansas, supra,* that the seven century-old common law rule of knock-and-announce was a part of the Fourth Amendment. The Court explained where the presumption in favor of announcement would yield, *id.* at 1918-19:

> Thus, because the common-law rule was justified in part by the belief that announcement generally would avoid "the destruction or breaking of any house . . . by which great damage and inconvenience might ensue," *Semayne's Case,* [5 Co. Rep. 91a,] 91b, 77 Eng. Rep. [194,] 196 [(K.B. 1603)], courts acknowledged that the presumption in favor of announcement would yield under circumstances presenting a threat of physical violence. *See, e.g., Read v. Case,* 4 Conn. 166, 170 (1822) (plaintiff who "had resolved . . . to resist even to the shedding of blood . . . was not within the reason and spirit of

the rule requiring notice"); *Mahomed v. The Queen*, 4 Moore 239, 247, 13 Eng. Rep. 293, 296 (P.C.1843) ("While he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them? The law in its wisdom only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary"). Similarly, courts held that an officer may dispense with announcement in cases where a prisoner escapes from him and retreats to his dwelling. *See, e.g., ibid.; Allen v. Martin*, 10 Wend. 300, 304 (N.Y.Sup.Ct.1833). Proof of "demand and refusal" was deemed unnecessary in such cases because it would be a "senseless ceremony" to require an officer in pursuit of a recently escaped arrestee to make an announcement prior to breaking the door to retake him. *Id.*, at 304. Finally, courts have indicated that unannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given. *See Ker*, 374 U.S., at 40-41, 83 S.Ct., at 1633-1634 (plurality opinion); *People v. Maddox*, 46 Cal. 2d 301, 305-306, 294 P.2d 6, 9 (1956).

We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.

The " 'underlying command of the Fourth Amendment is always that searches and seizures be reasonable.' " *Wilson v. Arkansas, supra,* at 1916 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)).

Wilson was hardly the first case to express the importance of announcement. In *Miller v. United States,* 357 U.S. 301, 313-14 (1957), the Court stated the importance of the values protected by the knock-and-announce requirement:

> We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in 18 U.S.C. § 3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. The petitioner could not be lawfully arrested in his home by officers breaking in without first

giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed.

B. Wisconsin's blanket rule.

Wisconsin's blanket rule is based on its belief that officers should be able to excuse announcement in their own discretion on two grounds: first, as a matter of officer safety because suspects are often armed and a lot of police officers get shot in "drug related matters" and, secondly, as a matter of evidence preservation because drugs are easily disposed of. *Richards, supra,* at 856-58, 549 N.W.2d at 225-26 (J.A. 92-95) (quoted *supra* in the Statement of the Case).

C. The Wisconsin court's reasoning is based on false assumptions of fact.

1. Drug dealers do not have "ballistically superior weapons"

The majority opinion in *Richards,* 201 Wis. 2d at 855-56, 549 N.W.2d at 225-26 (J.A. 91-92), justifies its conclusion in part on the rationale that police officers are outgunned by drug dealers with "ballistically superior weapon[s]," citing R.J. Adams & T.M. McTernan, *Street Survival: Tactics for Armed Encounters* 35 (1980), a work seventeen years old and cited in Note, Allegro, 64 Notre Dame L.Rev. at 555.

Whatever the authors are referring to is not true today. Virtually every police department in America has been arming all its officers with 9mm, 10mm, and .40 caliber semi-automatic weapons with 15 round clips. In addition, drug raids are often conducted with SWAT team assistance with military-style assault-type weaponry, including submachine guns and automatic weapons and stun grenades, battering rams, and Kevlar helmets and bulletproof vests. *See, e.g., Sledd v. Lindsay*, 102 F.3d 282, 286 (7th Cir. 1996); *Jenkins v. Wood, supra; People v. Brown*, 1996 WL 743502 (N.Y.App.Div., Dec. 31, 1996) (Mazzerelli, J., dissenting). Last, but not least, law enforcement officers conducting drug raids are highly trained in securing the premises and neutralizing the occupants without violence. The persons inside do not have the same weaponry and training.

2. The State's statistics on officer deaths in drug cases do not translate to deaths in drug raids.

The U.S. Department of Justice keeps voluminous records of the numbers of police officers killed in the United States. The report, U.S. Department of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted*, is annually published (hereafter, UCR (year)). The court below discussed shooting generally, relying on the reports of 1977-86 from a law review article referring to officers dying in "drug related matters." *Richards*, 201 Wis. 2d at 853-55 nn. 8-10, 549 N.W.2d at 223-25 nn. 8-10 (J.A. 88-92).

This contention is fallacious. The number of officers killed in drug raids is not readily apparent. The tables in the UCRs show the number of officers killed each year in "drug related matters," but are overinclusive. The summaries in the UCRs must be consulted for an accurate view.

Our analysis of the 1981-94 reports shows that the overwhelming majorities of felonious deaths of peace officers were unrelated to the execution of search warrants for drugs.[13] There is no significant statistical correlation between announcement or lack of announcement and the resulting deaths. Only 8 of 23 summaries even mention whether announcement occurred. The circumstances of some killings show that the officer was shot on entry, but the greatest threat to officers was from being shot by assailants hidden inside and not from being shot on entry. The summaries are in Appendix B. At least one of the raids (Stockton, California, 1993), involved a tip there were drugs on the premises, but there were none. The police killed the occupant after he shot the officer. This shooting is discussed in James Bovard, *Lost Rights* 236, at nn. 304-05 (1994). The summaries do not mention how many officers were shot serving warrants where no drugs were found.

For what it is worth, the UCRs show that no Wisconsin officer died executing a search warrant for drugs in

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[13] Officers seem to be at least as likely to be shot arranging a drug buy where no search is involved.

that period. However, newspaper reports show that one unarmed citizen was shot by Wisconsin officers just since *Stevens*. *See* "They Shot Daddy," *infra*.

3. Citizen deaths during drug raids.

The U.S. Department of Justice does not keep records of the number of citizens that die during drug raids. Other sources[14] show that at least as many innocent citizens as police officers die during drug raids, not even mentioning drug dealers who die. Even when police officers enter announcing their purpose, there often will be questions of whether the people inside could hear the self-servingly claimed shouts of "Police; search warrant!"[15]

In Beaver Dam, Wisconsin on April 17, 1995, Scott Bryant, an unarmed accused marijuana dealer, was shot to death inside his home in the presence of his 7 year-old

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[14] Tragedy was barely averted in *State v. Coleman*, 199 Wis. 2d 174, 176-78, 544 N.W.2d 912, 913-14 (Ct. App. 1996), *aff'd*, 206 Wis. 2d 198, 556 N.W.2d 701 (1996), where Milwaukee officers executing a no-knock warrant yelled, "Police, search warrant!" as soon as they entered. They faced a householder with a gun who thought he was being robbed. The court held that a narrow defense of privilege existed to the charge of being a felon in possession of a firearm. The Wisconsin Supreme Court mentioned his surprise that the people breaking his door down were police officers, and, as soon as he realized they were the police, he dropped his gun and raised his hands. *Coleman*, 206 Wis. 2d at 203, 556 N.W.2d at 703.

[15] *See State v. Coleman, supra*. In addition, home invasion robberies sometime involve robbers impersonating police officers.

son. The officer shot him immediately on entry during a drug raid. The prosecutor relied on *Stevens* in determining that charges would not be filed against the officer. Chip Mitchell, "They Shot Daddy," Isthmus (Madison, WI) 1, 8-9 (June 30, 1995).

As important as it is that police officers not die executing drug warrants, is it not just as important that citizens not die, either? Selling or possessing marijuana is not a crime of violence justifying deadly physical force. *See Tennessee v. Garner*, 471 U.S. 1 (1985). Yet, Wisconsin's rule invites death. Scott Bryant, a non-violent citizen cloaked with the presumption of innocence, was needlessly slaughtered in Wisconsin as a result of its blanket rule. How many more must die before the folly of the blanket exception is finally recognized?

4. Raiding the homes of innocent citizens.

It appears that the police often raid the wrong house either because they have bad information or because they are negligent.

Dozens of examples of erroneous no-knock drug raids were given and newspaper articles were reprinted in the Congressional Record when the federal no-knock law was repealed in 1974. 120 Cong.Rec. 22882-906 (July 11, 1974). Several more recent examples appear in James Bovard, *Lost Rights* 234-39 (1994), and James Bovard, "Oops, You're Dead: The Body Count from No-Knock Drug Raids is Climbing, Are You Next?", Playboy 50-51 (Dec.1994). For an earlier article, *see* Andrew H. Malcolm,

"Violent Drug Raids Against the Innocent Found Widespread," The New York Times (June 25, 1973) A1. *See also* CBS News, *60 Minutes*, Vol. XXV, No. 27 at 6-7 (Mar. 28, 1993). [Fortune 500 company executive, who had been sleeping, shot three times when police, without announcement, raided his home for drugs. None were found.] In a 1993 newspaper article, a DEA supervising agent admitted that the wrong places are raided continually:

> With alarming frequency, police in their quest for drugs are raiding the homes of innocent people.
>
> "It happens every day in this business," said Capt. Art Binder of the Cumberland County (N.C.) Sheriff's Department, whose own officers recently raided two wrong houses before hitting, on their third try, the right one.
>
> Last year alone, police killed at least three innocent people during errant drug searches, wounded another and traumatized countless more.
>
> The survivors of these raids report months of counseling, trouble with their children,[16] and nightmares so intense that some have moved just to get away from the memories . . .
>
> After the New Mexico raid, Tom Smith, the assistant special agent in charge of the DEA's Albuquerque office, said it was not unusual to come up empty handed.
>
> "It happens all the time," he said.

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16 It does not instill respect for law enforcement in children when law enforcement practices terrorize them.

Joe Hallinan, "Drug Wars: Fervor Often Injures the Innocent," New Orleans (LA) Times-Picayune (Sept. 26, 1993) A20 (footnote added). The numbers of erroneous raids even reported in the press may only be the tip of the iceberg because not every aggrieved citizen dares complain.

When the federal no-knock law was being repealed, many senators eloquently pronounced this law unconstitutional under the Fourth Amendment as inherently, unjustifiably dangerous to citizens and police officers alike. As Senator Nelson summed it up:

> Mr. President, approximately 185 years ago, Thomas Jefferson warned that "the natural progress of things is for liberty to yield and government to gain ground."
>
> Unfortunately, that warning has proved prophetic all too often. On too many occasions government needs have been given priority over individual liberties.
>
> Nowhere is this more true than in the enactment of the no-knock provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970. . . .

120 Cong. Rec. at 22888-89.[17]

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[17] Similar opposition was stated when the federal no-knock law was adopted. 116 Cong.Rec. 1159-62, 1163-77, 33639-666. The arguments remain unchanged, only the names of the participants have changed. *See, e.g.*, Sen. Sam Ervin of North Carolina criticizing this statute which "encourages the officer to emulate[] the actions of a burglar and [break] into a house without notice, concealing the fact that he has a search warrant . . . " *Id.* 1163.

5. What is the remedy for mistakes?

Are there any remedies for the citizenry of this nation from police mistakes?

Can a civil claim be made against police negligently raiding the wrong house or negligently killing the occupant? No. Negligence cannot form the basis of a 42 U.S.C. § 1983 case. *Daniels v. Williams*, 474 U.S. 327 (1986); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). The police cannot be sued for negligence under most states' laws, either. It is possible under the law of some states for a citizen to file a negligence claim,[18] but they are few and far between. Officers can easily claim they relied in good faith on their informant to avoid liability,[19] a standard this Court already requires trial courts to apply in the usually unsuccessful veracity challenges to affidavits under *Franks v. Delaware*, 438 U.S. 154, 171 (1978). This Court recognized long ago that alternative remedies are useless in enforcing the requirements of the

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[18] Rev. Accelyne Williams, a 75 year old black minister, was the subject of a groundless drug raid. After breaking down his door, the police chased him through the house to his bedroom, and handcuffed him. This provoked a heart attack which killed him. The police had obtained a no-knock warrant because their informant had told them they could expect armed resistance. His widow settled with the Boston Police Department for $1,000,000. "Boston to Give Victim's Widow $1 Million in Wrongful Death Suit," N.Y. Times Abstracts (Apr. 25, 1996) 1996 WL 7503359; "Boston Settles Death Suit," National Law Journal (May 6, 1996) A8.

[19] *See, e.g., Jenkins v. Wood, supra;* Written testimony of Donald Carlson, U.S. Congress, House Government Operations Committee, Hearing on Asset Forfeiture (June 22, 1993).

Fourth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 652-53 (1961).

Will the police officer be prosecuted for negligent homicide? It may be theoretically possible, but what prosecutor wants to charge the police in his or her jurisdiction for anything? *See, e.g.,* Mitchell, "They Shot Daddy," *supra;* Kathy Scruggs, "Officer: Police Bullet Killed Boy," Atlanta Constitution (Nov. 14, 1991).

Yet, the police will certainly prosecute a homeowner defending himself. Some are acquitted or the charges are later dismissed. *See, e.g.,* "Man Innocent of Police Murder during Drug Raid," United Press International (Aug. 17, 1989); Diego Ribadeneira, "Flynn Forms Panel to Study Police Drug Unit's Methods," Boston Globe (Apr. 14, 1989) at 1.

6. Protection against mistakes.

The knock-and-announce rule is intended to protect against mistakes. In *Ker v. California,* 374 U.S. 23, 57-58 (1963), Justice Brennan, writing for four Justices concurring and dissenting, said:

> Beyond these constitutional considerations, practical hazards of law enforcement militate strongly against any relaxation of the requirement of awareness. First, cases of mistaken identity are surely not novel in the investigation of crime. The possibility is very real that the police may be misinformed as to the name or address of a suspect, or as to other material information. That possibility is itself a good reason for holding a tight rein against judicial

> approval of unannounced police entries into private homes. Innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion. Second, the requirement of awareness also serves to minimize the hazards of the officers' dangerous calling. We expressly recognized in *Miller v. United States, supra,* 357 U.S., at 313, n. 12, that compliance with the federal notice statute "is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder." Indeed, one of the principal objectives of the English requirement of announcement of authority and purpose was to protect the arresting officers from being shot as trespassers, " * * * for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost." *Launock v. Brown,* 2 B. & Ald. 592, 594, 106 Eng. Rep. 482, 483 (1819).
>
> These compelling considerations underlie the constitutional barrier against recognition of exceptions not predicated on knowledge or awareness of the officers' presence.

The Wisconsin rule has conducted balancing of individual liberty and the public need in advance, *a priori,* without regard to the potential facts, and it has left individual liberty wanting. Under the blanket exception, mistakes of the police are tolerable, no matter how grievous they may be. Deference to the police cannot be this absolute under our form of government.

III. DEFERENCE TO "SPECIAL NEEDS" OR "OPERATIONAL NECESSITIES" IN THIS AREA OF LAW IS BOOTSTRAPPING. THE ENTIRE PREMISE OF JUDICIAL REVIEW OF SEARCH AND SEIZURE QUESTIONS REQUIRES TRIAL AND APPELLATE ANALYSIS OF REASONABLENESS.

A. Neither "special needs" nor "operational necessities" support the blanket rule.

1. The holdings from this Court on "special needs."

The court below did not mention this topic, but this Court likely will, so we address it now: If the Court adopts the blanket exception to knock-and-announce in drug cases, it would also have to create a new exception to the "special needs" exception to the probable cause and warrant requirement for what amounts to a question of execution of a search warrant.

The Court first addressed the "special needs" exception in Fourth Amendment cases in *New Jersey v. T.L.O.*, 469 U.S. 340, 351 (1985) (Blackmun, J., concurring), where the Court held that neither a warrant nor probable cause was necessary to conduct a search of a student where there was reasonable suspicion to believe that the student was in possession of contraband, considering the unique status that a school has with the children attending it.

> Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.

The Court has applied Justice Blackmun's language repeatedly in finding exceptions to the warrant requirement. *See, e.g., Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987) (probationer searches); *Skinner v. Railway Labor Executive's Association,* 489 U.S. 602, 620 (1989) (urine testing of railroad employees involved in accidents); *Vernonia School Dist. 47J v. Acton,* 115 S.Ct. 2385, 2391 (1995) (urine testing of student athletes).

Only *Griffin* involved a dwelling, and the Court held there that an informant's tip that the probationer was in possession of a weapon was a sufficient basis to authorize a warrantless search under probation regulations requiring reasonable grounds to believe that the probationer was violating the law. *Griffin, supra,* at 875.

In two other cases, the Court has mentioned "operational necessities" as a justification for a police seizure on less than probable cause. *See Arizona v. Hicks,* 480 U.S. 321, 327 (1987):

> We do not say, of course, that a seizure can never be justified on less than probable cause. We have held that it can – where, for example, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime. *See, e.g., United States v. Cortez,* 449 U.S. 411 (1981) (investigative detention of vehicle suspected to be transporting illegal aliens); *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975) (same); *United States v. Place,* 462 U.S. 696, 709, and n. 9 (1983) (dictum) (seizure of suspected

drug dealer's luggage at airport to permit exposure to specially trained dog). No special operational necessities are relied on here, however – but rather the mere fact that the items in question came lawfully within the officer's plain view. That alone cannot supplant the requirement of probable cause.

2. How do they apply? Can they apply?

Here, the police obtained a warrant after satisfying a judge that there was probable cause for a search. So, on the one hand, probable cause has been shown. But, does that still permit them to nullify a basic constitutional protection and the requirement that all searches be reasonable without showing any specific articulable facts that they have a need to dispense with announcement? (The phrases "operational necessities" and "special needs" are seductive in this situation; but the Court should not be tempted.)

Remember that here a dwelling was involved, and only one case permitted a search of a dwelling on less than probable cause and with "special needs": *Griffin v. Wisconsin* where the probationer was already on the street by the grace of the executive branch of state government and under its complete control. These historical facts of life of probationers made the use of a lesser standard of probable cause permissible.

For the "special needs" exception to apply, there has to be some existing relationship between the person conducting the search and the person to be searched. The "special needs" exception has never been extended to a

purely criminal search. If the Court does so here, "reasonableness" will be a concept that will forever defy definition. And, if "reasonableness" can no longer be defined, then the courts will never be able to determine whether particular police conduct is lawful. And, if that happens, the "reasonableness" requirement of all searches and police activity will have been virtually read out of the law.

B. Deference to the police is a dangerous proposition when knock-and-announce is at issue.

The Wisconsin rule defers to the police the question of reasonableness in drug searches. This is a dangerous proposition that goes far beyond anything this Court has ever approved. As the Court said in 1964, "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964) (quoted in *United States v. Leon*, 468 U.S. 897, 915 n. 13 ((1984)) as a function belonging to a neutral and detached magistrate). What the state has done here gives the police absolute discretion to determine how a householder will give up his or her privacy to a search warrant.

C. Deference to the police and "blanket rules" are contrary to established law.

The Wisconsin blanket rule is contrary to established law and the genius of the reasonableness requirement.

This court has never sanctioned this kind of deference in Fourth Amendment cases. In *United States v. Leon*, 468 U.S. 897, 914 (1984), the Court held that even deference to magistrates is not boundless. Deference to police is inappropriate because they are " 'engaged in the often competitive enterprise of ferreting out crime,' " *id.* (quoting *United States v. Johnson*, 333 U.S. 10, 14 (1948)).

> Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable cause determination reflected an improper analysis of the totality of the circumstances.

Id. at 915. In adopting the "totality of circumstances" test for probable cause in *Illinois v. Gates*, 462 U.S. 213, 229 (1983), the Court held:

> Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a bare ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.

See Malley v. Briggs, 475 U.S. 335 (1986) (officer may be civilly liable for executing a warrant that could not justifiably be relied on).

As to the veracity of the officer applying for a warrant, the Court has said that the officer's statement of

probable cause is open to challenge for knowing or reckless falsity, holding that "a flat ban on impeachment of veracity could denude the probable cause requirement of all meaning." *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

Similarly, the Court has never held that the method of conducting a search is beyond judicial review, either. In *Terry v. Ohio*, 392 U.S. 1, 15 (1968), the Court held that

> courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which entrenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

"[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope . . . The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* at 17-19. The Court sanctioned a limited patdown for weapons where a reasonably prudent officer would be warranted in the belief, based on "specific and articulable facts," *id.* at 21, and not on a mere "inchoate and unparticularized suspicion or 'hunch,' " *id.* at 27, "that he is dealing with an armed and dangerous individual." *Id.*

Finally, "[t]he manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Dalia v. United States*, 441 U.S. 238, 258 (1979). *See also Arizona v. Hicks, supra*, reviewing an overintensive search.

Perhaps the closest case of all is *Maryland v. Buie*, 494 U.S. 325 (1990), the protective sweep case. There, the state argued for a blanket rule, which this Court rejected. *Id.* at 334 n. 2. The *Buie* Court held that "specific and articulable facts" demonstrating a potential danger to the officer were required to be shown before officers could conduct a protective sweep. *Id.* at 334, 336, 337. *Buie* rejected essentially the same justification made here:

> The State's argument that no level of objective justification should be required because of "the danger that inheres in the in-home arrest for a violent crime," Brief for Petitioner 23, is rebutted by *Terry v. Ohio*, 392 U.S. 1 (1968), itself. The State argues that "[o]fficers facing the life threatening situation of arresting a violent criminal in the home should not be forced to pause and ponder the legal subtleties associated with a quantum of proof analysis," Brief for Petitioner 23. But despite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters. Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted. That approach is applied to the protective sweep of a house.
>
> We reject the State's attempts to analogize this case to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), and *Michigan v. Summers*, 452 U.S. 692 (1981). The intrusion in *Mimms* – requiring the driver of a lawfully stopped vehicle to exit the car – was *"de minimis,"* 434 U.S., at

> 111. *Summers* held that a search warrant for a house carries with it the authority to detain its occupants until the search is completed. The State contends that this case is the "mirror image" of *Summers* and that the arrest warrant carried with it the authority to search for persons who could interfere with the arrest. In that case, however, the search warrant implied a judicial determination that police had probable cause to believe that someone in the home was committing a crime. Here, the existence of the arrest warrant implies nothing about whether dangerous third parties will be found in the arrestee's house. Moreover, the intrusion in *Summers* was less severe and much less susceptible to exploitation than a protective sweep. A more analogous case is *Ybarra v. Illinois*, 444 U.S. 85 (1979), in which we held that, although armed with a warrant to search a bar and bartender, the police could not frisk the bar's patrons absent individualized, reasonable suspicion that the person to be frisked was armed and presently dangerous. Here, too, the reasonable suspicion standard – "one of the relatively simple concepts embodied in the Fourth Amendment," *United States v. Sokolow*, 490 U.S. 1 (1989) – strikes the proper balance between officer safety and citizen privacy.

The leading case[20] on the so-called blanket rule in knock-and-announce is *People v. Gastelo*, 67 Cal. 2d 586, 588-89, 63 Cal. Rptr. 10, 12, 432 P.2d 706, 708 (1967), where Justice Traynor held that the particularity clause was also violated by a blanket rule:

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[20] 2 Wayne R. LaFave, *Search and Seizure* § 4.8(d), at 611 (3rd ed. 1996).

> Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard – the requirement of particularity – would be lost. Just as the police must have sufficiently particular reason to enter at all, so must they have some particular reason to enter in the manner chosen.

(Illinois recently rejected a blanket rule under *Wilson* and applicable state law. *People v. Krueger*, 1996 WL 732035, 65 U.S.L.W. 2443 (Ill. Dec. 19, 1996)).

Wisconsin initially rejected the blanket rule in *State v. Cleveland*, 118 Wis. 2d 615, 631 n. 16, 348 N.W.2d 512, 521 n. 16 (1984). The court said

> The officer must have knowledge of specific facts which indicate that this particular person will conduct himself or herself in this manner when confronted by police. In this case, however, there was no information that the defendant was armed or had taken other security precautions.

Neither the *Richards* nor *Stevens* decisions explained the legal principles upon which the blanket rule can comport with the Fourth Amendment. Indeed, in *Richards, supra*, at 849 n. 6, 549 N.W.2d at 521 n. 6, (J.A. 85) the court states that its "holding is based on the assumption that drug dealers will have weapons and pose a danger to officers . . . " The *Richards* court also stated that "[p]olice

officers face an unquantifiable risk of violence every time they go into a house to execute a search warrant." *Id.* at 850, 549 N.W.2d at 223 (J.A. 86). Therefore, the Wisconsin Supreme Court has abandoned the knock-and-announce rule based on "assumption[s]" that are in turn based on risks that are "unquantifiable."

D. The Wisconsin rule subverts judicial review of reasonableness.

It is the function of trial and appellate courts to determine reasonableness in every case, and no case has dispensed with it as this blanket rule does. *Leon* and *Gates* show that deference to the magistrate is not boundless; rather, judicial review enables the courts to determine whether probable cause existed for the search. It is the fundamental function of the courts to review executive action under the separation of powers principle. Accordingly, reasonableness is always subject to review. *Wilson v. Arkansas, supra,* at 1919; *Ornelas v. United States,* 116 S.Ct. 1657, 1662 (1996).

If this Court adopts Wisconsin's position on the blanket rule, *Wilson* and *Buie* become meaningless abstractions.

E. The standard should be reasonable suspicion under *Buie* and "totality of the circumstances" on review

The rules of *Buie* and *Gates* should apply: Officers must be able to point to specific and articulable facts which justify their entering without announcement under

any of the recognized exceptions to knock-and-announce. The court can look to the "totality of the circumstances" to see whether the police action was justified.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Wis. Stats. § 968.10 (1989-90):

Searches and seizures; when authorized

A search of a person, object or place may be made and things may be seized when the search is made:

(1) Incident to a lawful arrest;

(2) With consent;

(3) Pursuant to a valid search warrant;

(4) With the authority and within the scope of a right of lawful inspection;

(5) Pursuant to a search during an authorized temporary questioning as provided in s. 968.25; or

(6) As otherwise authorized by law.

Wis. Stats. § 968.12 (1989-90):

Search warrant

(1) Description and issuance. A search warrant is an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property. A judge shall issue a search warrant if probable cause is shown.

(2) Warrant upon affidavit. A search warrant may be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter or under sub. (3)(d), showing

probable cause therefor. The complaint, affidavit or testimony may be upon information and belief.

(3) Warrant upon oral testimony.

. . .

(c) Issuance. If the judge determines that there is probable cause for the warrant, the judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the judge's name on the duplicate original warrant. In addition, the person shall sign his or her own name on the duplicate original warrant. The judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony shall be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

. . .

(e) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(f) Entry of time of execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(4) Location of search. A search warrant may authorize a search to be conducted anywhere in the state and may be executed pursuant to its terms anywhere in the state.

Wis. Stats. § 968.13 (1989-90):

Search warrant; property subject to seizure

(1) A search warrant may authorize the seizure of the following:

(a) Contraband, which includes without limitation because of enumeration lottery tickets, gambling machines or other gambling devices, lewd, obscene or indecent written matter, pictures, sound recordings or motion picture films, forged money or written instruments and the tools, dies, machines or materials for making them, and controlled substances, as defined in s. 961.01(4), and controlled substance analogs, as defined in s. 961.01(4m), and the implements for smoking or injecting them. Gambling machines or other gambling devices possessed by a shipbuilding business that complies with s. 945.095 are not subject to this section.

(b) Anything which is the fruit of or has been used in the commission of any crime.

(c) Anything other than documents which may constitute evidence of any crime.

(d) Documents which may constitute evidence of any crime, if probable cause is shown that the documents are under the control of a person who is reasonably suspected to be concerned in the commission of that crime under s. 939.05(2).

(2) In this section, "documents" includes, but is not limited to, books, papers, records, recordings, tapes, photographs, films or computer or electronic data.

Wis. Stats. § 968.22 (1989-90):

Effect of technical irregularities

No evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant.

APPENDIX B

U.S. Department of Justice, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted (UCR (year)), analysis of annual summaries of officer killings in drug raids:

In 1994, one officer died during a drug raid at a Los Angeles Hotel. The officers knocked and announced, and an assailant hiding under the bed shot the officer in the course of the search. The SWAT team killed the assailant. UCR (1994) 45.

In 1993, two officers died in drug raids and one died in a "buy-bust" situation. The drug raid killings were in Stockton, California and Shreveport, Louisiana. In both descriptions, the element of surprise had nothing to do with the killing; the officers were killed well after announcement by persons coming from inside rooms away from the room where entry occurred. UCR (1993) at 41, 47. The "buy-bust" was in New York City, and the summary says nothing about when or where the shooting occurred in relation to a drug raid. *Id.* 49.

In 1992, three officers died in drug raids. In Palmdale, CA. an officer was killed inside the house after announcement. In El Paso County, Colorado, the officer was shot on entry. An officer in Shreveport was killed in a drug raid where he was shot by a person hidden in a bedroom. UCR (1992) 42, 47.

In 1991, no officer died during a drug raid. UCR (1991).

In 1990, two officers were killed. In West Sacramento, California an officer was shot pursuing a drug suspect to

a bedroom after entry. An FBI agent was killed in St. Louis, Missouri after opening a bedroom door inside; the officer and his assailant shot simultaneously. UCR (1990) 23 & 30.

In 1989, there were two deaths. In San Joaquin County, California, the slain officer, standing at the back window trying to divert the attention of the occupants, was shot from inside. A Titusville, Florida officer was shot entering a bedroom after the initial entry. UCR (1989) 26, 27

In 1988, there were three deaths during drug raids. An officer in Los Angeles County, California was killed, apparently on entry. An officer in Wichita, Kansas, was killed after entry by a suspect hidden in kitchen. A Boston, Massachusetts officer was killed by a suspect shooting through the door after forcible entry was attempted and failed (whether announcement occurred is not mentioned). UCR (1988) 24, 29, 31.

In 1987, one officer died during a drug raid in Ft. Pierce, Florida. He was killed after entry when he fired at a suspect first and his gun jammed; the suspect returned fire. UCR (1987) 25.

In 1986, there were no officer deaths during drug raids. UCR (1986).

In 1985, there was one officer death during a drug raid in Westville, New Jersey: an officer was shot dead by a person hidden inside after police handcuffed the first arrestee. UCR (1985) 33.

In 1984, one officer was killed in a drug raid. The attempted forcible entry in Longview, Texas failed

because the door was held by a chain. The assailant shot through the opening. UCR (1984) 24.

In 1983, five officers perished in drug raids. An officer in Townsend, Georgia, was stabbed in the back. A Pine Lawn, Missouri officer announced his presence, entered, and was shot. An Alameda, California officer was shot by a suspect who was leaving through a window trying to escape. A Los Angeles, California, officer was shot while entering through a window. In Pittsburgh, Pennsylvania, an officer was shot during a raid where the first officer entered by ruse and lost her gun to the occupants. When the others tried to enter to get her, one got shot. UCR (1983) 23, 24, 26, 27, 32.

In 1982, one officer was killed during a drug raid in San Joaquin County, California. There was announcement and refusal, but the forced entry failed. The assailant opened the door and shot him. UCR (1982) 26.

In 1981, one officer was killed during a drug raid in Tampa, Florida. After announcement and entry, there was gunfire from the bedroom. UCR (1981) 28.

The UCR (1995) will be published shortly.

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In The
Supreme Court of the United States
October Term, 1996

STEINEY J. RICHARDS,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ of Certiorari To The
Supreme Court Of The State of Wisconsin

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Do the governmental interests promoted by the blanket (bright-line) rule reaffirmed in *State v. Richards*, 201 Wis. 2d 839, 549 N.W.2d 218 (1996), outweigh the individual interests protected by the rule of announcement so that the bright-line rule passes the Fourth Amendment test of reasonableness applied in *Maryland v. Wilson*, 65 U.S.L.W. 4124 (U.S. Feb. 19, 1997)?

2. Did the police have a particularized and objective basis for suspecting that further announcement would result in a threat to safety, the flight of the suspect or the destruction of evidence so that their entry into the defendant's room prior to announcing the purpose of the entry passes the Fourth Amendment test for reasonableness applied in *Ohio v. Robinette*, 117 S. Ct. 417 (1996)?

3. Was the police entry into the defendant's room prior to announcing the purpose of the entry reasonable because further announcement would have been a useless gesture once the defendant closed and locked the door after looking in the direction of a uniformed police officer?

4. If the police entry into the defendant's room was unreasonable under the Fourth Amendment, should the exclusionary rule be applied to prevent the state from introducing at trial the evidence seized in the execution of the search warrant?

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No. 96-5955

In The

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STEINEY J. RICHARDS,

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On Writ of Certiorari To The
Supreme Court Of The State of Wisconsin

BRIEF OF RESPONDENT

STATUTE INVOLVED

Wis. Stat. § 961.41(1) (1995-96). The provisions of this statute are set forth in the appendix to this brief.

STATEMENT OF FACTS

This Statement of Facts is provided to correct and supplement the "Statement of the Case" in the Petitioner's Brief.

The Petitioner's Brief at page 6 states that Detective Pharo was accompanied by an officer in "'full military uniform'" and two or three others in uniform.

That statement is inconsistent with the record. Detective Pharo testified that, when he was at the defendant's door, to his "right there were at least three police officers, one of which was in uniform. The other officers were in plain clothes" (J.A. 39). He also said that to his left were two more officers in plain clothes (J.A. 39). Thus, Detective Pharo testified that one, not three, of the officers was in uniform.

Pharo testified that the length of time from when the defendant opened the door to when he shut it after looking at Pharo and over Pharo's shoulder was maybe four to five seconds (J.A. 38-39).

The defendant testified that when he looked out the door he did not see anyone other than Detective Pharo (J.A. 47).

The trial court found that the defendant's testimony was self-serving and that it lacked some credibility (J.A. 54). The court said that the defendant's actions in jumping out the window would lead someone to believe that he did not want Pharo to come in, even if he was a maintenance man, because Pharo was accompanied by a uniformed police officer (J.A. 54).

SUMMARY OF ARGUMENT

In *Wilson v. Arkansas*, 115 S. Ct. 1914, 1915 (1995), this Court held that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." The common law knock and announce principle recognized a law enforcement officer's authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority. *Id.*

In *State v. Richards*, 201 Wis. 2d 839, 549 N.W.2d 218 (1996), the Wisconsin Supreme Court reaffirmed a rule it had adopted prior to *Wilson v. Arkansas* and held that the police are not required to adhere to the rule of announcement whenever they execute a search warrant for felonious drug dealing.

The defendant contends that the bright-line rule reaffirmed in *Richards* cannot comply with the reasonableness inquiry under the Fourth Amendment because it does not look to the particular facts of each search to determine whether the entry into the residence was reasonable.

Contrary to the defendant's claim, the rule reaffirmed in *Richards* is reasonable under the Fourth Amendment. The legitimate governmental interests in police safety, crime detection and prevention and the prevention of flight by the suspect outweigh the occupant's interest in privacy and property rights. Therefore, the bright-line rule reaffirmed in *Richards* satisfies the Fourth Amendment reasonableness test applied in *Maryland v. Wilson*, 65 U.S.L.W. 4124 (U.S. Feb. 19, 1997).

The entry also satisfied the Fourth Amendment test applied in *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996), where the Court emphasized the fact-specific nature of the reasonableness inquiry. Balancing the same governmental and individual interests considered in evaluating the blanket rule demonstrates that the appropriate level of justification that must be satisfied to make an unannounced entry is the reasonable suspicion test rather than probable cause. In this case, the police had a warrant to search the defendant's room for evidence of drug dealing. Because of the recognized connection between drug dealing and guns and violence, when the police have probable cause to search a dwelling for evidence of drug dealing, they have reasonable suspicion to believe that their safety will be threatened if they announce their identity and

purpose before entering. Because of the ease with which narcotics can be destroyed, the police also have reasonable suspicion to believe that if they knock and announce prior to entering, the occupant will destroy, or attempt to destroy, the evidence before the police can enter. To minimize the risk to their safety and the risk of destruction of evidence, an unannounced entry by the police to execute a search warrant for evidence of drug dealing is reasonable.

Under the circumstances of this case, the entry was reasonable because, once the defendant closed the door after looking in the direction of the uniformed officer, the facts known to the police made it virtually certain that any further announcement would have been a useless gesture. By closing the door after looking in the direction of the uniformed officer, the defendant demonstrated that he knew why the men were at his door. Because any further announcement by the police would have been a useless gesture, immediate entry by the police was reasonable.

Finally, if the Court concludes that the police entry was unreasonable, the exclusionary rule should not be applied to render inadmissible the evidence seized in the execution of the search warrant. Because the evidence was seized under the authority of the valid search warrant and was not seized due to exploitation of illegality, the exclusionary rule should not apply.

ARGUMENT

I. IT WAS REASONABLE FOR THE POLICE TO FORCIBLY ENTER THE DEFENDANT'S ROOM BEFORE ANNOUNCING THEIR PURPOSE.

A. Pursuant to *Wilson v. Arkansas*, unannounced entries to execute search warrants are permissible when they are reasonable under the circumstances.

The police came to the defendant's room to execute a search warrant for evidence of possession of a controlled substance with intent to deliver (J.A. 8-10, 37-38). They knocked (J.A. 38). The defendant opened the door; but after looking in the direction of a uniformed officer, he closed the door and engaged the lock (J.A. 38-39). The police announced themselves as police officers and forced open the door (J.A. 39-40, 44-45). As the door was being opened, Detective Pharo heard one of the officers say "search warrant" (J.A. 66). As the door opened, Pharo heard glass breaking (J.A. 39). The defendant and his companion were jumping out the window (J.A. 47). After the defendant was through the window, an officer yelled, "'Police, freeze,'" and the defendant stopped (J.A.47).

The broad question in this case is whether it is reasonable for law enforcement officers to always have the authority to make an unannounced forcible entry to execute a search warrant for drug dealing, which the Wisconsin Supreme Court defined as a warrant to search for evidence of the crimes of delivery of a controlled substance or possession of a controlled substance with the intent to deliver. *Richards*, 201 Wis. 2d at 842 n.2, 549 N.W.2d at 219 n.2, and *State v. Stevens*, 181 Wis. 2d 410,

424-25, 511 N.W.2d 591, 595 (1994), *cert. denied*, 115 S. Ct. 2245 (1995).[1]

In the absence of the police always having authority to make an unannounced forcible entry to execute a search warrant for evidence of drug dealing, the more narrow question is whether under the circumstances of this case it was reasonable for the police to forcibly enter the hotel room before announcing their purpose.

In *Wilson v. Arkansas*, 115 S. Ct. at 1915, this Court held that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." The common law knock and announce principle recognized a law enforcement officer's authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority. *Id.* The Court explained that, pursuant to its holding, "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." *Id.* at 1918. The decision did not require that every entry must be preceded by an announcement because "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id.*

The Court explained that an unannounced entry would be reasonable where circumstances present a threat of physical violence, where the police seek a person who has escaped from them and retreated to his dwelling, and where the police have reason to believe that evidence would likely be destroyed if advance notice were given. *Wilson v. Arkansas*, 115 S. Ct. at 1919. The Court did not attempt to catalog all the situations where an

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[1]This Court denied the petition for certiorari in *Stevens v. Wisconsin*, 115 S. Ct. 2245 (1995), eight days after issuing the decision in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995).

unannounced entry would be reasonable; and it left to the lower courts the task of determining the circumstances under which an unannounced entry would be reasonable. *Id.* The Court explained that it was simply holding that

> although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.

Id.

In *Stevens* and *Richards*, the Wisconsin Supreme Court undertook the task of determining circumstances in which an unannounced entry is reasonable under the Fourth Amendment. Prior to the decision in *Wilson v. Arkansas*, the court held in *Stevens*, 181 Wis. 2d at 424-25, 511 N.W.2d at 595, that

> when the police have a search warrant, supported by probable cause, to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs "evidence of drug dealing", they necessarily have reasonable cause to believe exigent circumstances exist. Thus, in all such searches the police are justified in dispensing with the rule of announcement and making a no-knock entry.

(Footnote omitted.)

In *Richards*, 201 Wis. 2d at 842, 549 N.W.2d at 219, the Wisconsin Supreme Court examined the continuing validity of the holding in *Stevens* in light of *Wilson v. Arkansas*; and the court reaffirmed *Stevens*, concluding "that police are not required to adhere to the rule of

announcement when executing a search warrant involving felonious drug delivery."[2]

The defendant contends that the holding in *Richards* cannot pass the reasonableness test under the Fourth Amendment because it does not examine the particular circumstances of each search.

Contrary to the defendant's claim, the decision in *Richards* passes the reasonableness test as that test is applied in *Maryland v. Wilson*, 65 U.S.L.W. 4124 (U.S. Feb. 19, 1997), and in *Ohio v. Robinette*, 117 S. Ct. 417 (1996).

Under the holding of *Richards*, the police entry in this case was reasonable because the police were executing a search warrant for evidence of drug dealing. In addition, under the particular circumstances of this case, the entry was reasonable because, once the defendant closed the door after looking in the direction of a uniformed police officer, any further announcement by the police would have been a useless gesture.

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[2]The Brief *Amicus Curiae* of the American Civil Liberties Union at pages 11 and 26 misstates the holding of *Richards* because it states that the holding applies to all search warrants for narcotics. The Wisconsin Supreme Court, however, explained that its holding applied only to warrants to search for evidence of delivery of a controlled substance or possession of a controlled substance with intent to deliver. *Richards*, 201 Wis. 2d at 842 and n.2, 549 N.W.2d at 219 and n.2.

B. Because the governmental interests in police safety and crime detection and prevention outweigh the individual's interests that are protected by the rule of announcement, the bright-line rule in *Richards* authorizing police to make unannounced entries to execute search warrants for evidence of drug dealing is reasonable, just as the bright-line rule was found reasonable in *Maryland v. Wilson*.

1. Pursuant to *Maryland v. Wilson*, a bright-line rule is reasonable when the governmental interests outweigh the individual's interests.

In *Maryland v. Wilson*, 65 U.S.L.W. at 4125 n.1, this Court noted that, although it typically avoids *per se* rules concerning searches and seizures, it does not always avoid them. Just as a bright-line rule was found to be reasonable in *Maryland v. Wilson*, in the circumstances of this case where the police were executing a search warrant for evidence of drug dealing, the bright-line rule is reasonable.

In *Stevens*, 181 Wis. 2d at 424-25, 511 N.W.2d at 595, and *Richards*, 201 Wis. 2d at 842, 844, 549 N.W.2d at 219, 220, the Wisconsin Supreme Court adopted and reaffirmed a bright-line, or blanket, rule that police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery.

In approving the bright-line rule in *Maryland v. Wilson*, this Court held that "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop." *Maryland v. Wilson*, 65 U.S.L.W. at 4126.

The Court approved another bright-line rule in a Fourth Amendment context in *Michigan v. Summers*, 452 U.S. 692, 705 (1981), when it held

> that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.

(Footnotes omitted.)

Explaining the test for reasonableness under the Fourth Amendment, the Court said in *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977):

> The touchstone of our analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio*, 392 U.S. 1, 19 (1968). Reasonableness, of course, depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

In *Maryland v. Wilson*, 65 U.S.L.W. at 4125, the Court balanced the public's interest in officer safety with the passengers' liberty interest. The Court concluded that the danger to the traffic officer during the traffic stop outweighed the minimal intrusion imposed on the passengers by ordering them out of the car. *Id.* at 4126.

To evaluate the reasonableness of the bright-line rule reaffirmed in *Richards*, it is necessary to balance the legitimate governmental interests in making unannounced entries to execute a search warrant for evidence of drug dealing against the occupants' interests that are protected by the rule of announcement.

Governmental interests to be considered in the balancing test are police safety, *Maryland v. Wilson*, 65 U.S.L.W. at 4125, *Summers*, 452 U.S. at 697, *Mimms*, 434 U.S. at 110, *Terry v. Ohio*, 392 U.S. 1, 23 (1968); effective crime prevention and detection, *Summers*, 452 U.S. at 697, and *Terry*, 392 U.S. at 22; prevention of flight by the occupant of the place being searched, *Summers*, 452 U.S. at 702; the orderly completion of the search, *Summers*, 452 U.S. at 702, and *United States v. Place*, 462 U.S. 696, 704 (1983); and stopping and curtailing the drug trade, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989), *Place*, 462 U.S. at 703, and *Stevens*, 181 Wis. 2d at 431-32, 511 N.W.2d at 598.

The occupants' interests are reflected in the three purposes of the rule of announcement:

> (1) protecting the individual's privacy in the home; (2) decreasing the potential for violence by alerting the resident that the officer is legitimately on the premises; and (3) preventing the physical destruction of property by giving the resident the opportunity to admit the officer voluntarily.

Richards, 201 Wis. 2d at 845, 549 N.W.2d at 221. *See also* Note, *Announcement in Police Entries*, 80 Yale L.J. 139, 140-42 (1970).

2. When the police execute a search warrant for evidence of drug dealing, the governmental interests in officer safety and crime detection and prevention weigh heavily in favor of a bright-line rule.

In reaffirming the bright-line rule adopted in *Stevens*, the Wisconsin Supreme Court in *Richards*, 201 Wis. 2d at 850-60, 549 N.W.2d at 223-27, employed a balancing test

and considered the primary governmental interests to be officer safety and crime detection. In adopting the rule, the court in *Stevens*, 181 Wis. 2d at 432, 511 N.W.2d at 598, had cited the governmental interests in officer safety and stopping, or at least curtailing, the drug trade. The crime prevention and detection interests are served by a no knock entry because it reduces the opportunity for the occupants to destroy evidence before the police enter. *Stevens*, 181 Wis. 2d at 425-26, 511 N.W.2d at 595.

The dangers police officers confront when entering a suspect's home to execute a search warrant have been recognized by this Court. In *Summers*, the Court considered whether the police could detain the occupant of a residence while executing a warrant to search the location for contraband. In holding that the police had the authority, the Court said in *Summers*, 452 U.S. at 702-03:

> Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

(Footnote omitted.)

In *Maryland v. Buie*, 494 U.S. 325 (1990), the Court considered the circumstances under which police could make a protective sweep of a residence after executing an arrest warrant for one of the occupants. The Court said in *Buie*, 494 U.S. at 333:

> The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. . . . [U]nlike an encounter on the street or along a

> highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

In considering the appropriate action for the officer to take during the on-the-street encounter, this Court in *Terry*, 392 U.S. at 23, said "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties," and the Court cited American criminals' "long tradition of armed violence."

The "tradition of armed violence" is practiced by drug dealers. In *Von Raab*, 489 U.S. at 669, this Court noted that it was well known "that drug smugglers do not hesitate to use violence to protect their lucrative trade and avoid apprehension." In *Ybarra v. Illinois*, 444 U.S. 85, 106 (1979) (Rehnquist, J., dissenting), then-Justice Rehnquist pointed out that "[i]n the narcotics business, 'firearms are as much "tools of the trade" as are most commonly recognized articles of narcotics paraphernalia,'" citing *United States v. Oates*, 560 F.2d 45, 62 (2nd Cir. 1977).

The extent of the danger the police face in investigating drug dealers is reflected to a small degree in news accounts and statistics. Several news stories have reported that police were killed, injured or assaulted during narcotics investigations. Alice Thomas, *Drug Raids Becoming Riskier For Police*, The Columbus Dispatch, Jan. 19, 1996 (shooting occurred after police announced they would be coming into the home); *Detroit Police Honors*, Detroit Free Press, March 22, 1995, at 6B (officer wounded by shot fired after the police announced their presence); *Police Officer Shot While on Narcotics Case*, Chicago Tribune, Sept. 29, 1994, Chicagoland section at 2 (officer shot when suspect came to door with a weapon); David A. Sylvester, *Fatal Shootout, Fire in Drug Raid, San Jose Officer Seriously*

Injured in 1-Hour Gunbattle, San Francisco Chronicle, March 20, 1991, at A3 (officer seriously wounded when police forcibly entered after knocking and announcing and no one answered); Pierre Thomas, *One Killed, Four Wounded in Va. Drug Raid*, The Wash. Post, Jan. 11, 1990, at D1 (suspect was killed and four persons injured when gunfire erupted after the police identified themselves); Patricia Klein and William Overend, *Lawyer Killed, Officer Hurt in Raid on Alleged Cocaine Ring*, L.A. Times, Feb. 27, 1987, part 2 at 1 (officer wounded and suspect killed when the suspect fired at the police who forcibly entered after they had announced their presence with a bullhorn and unsuccessfully demanded to be admitted); Philip Watley and Henry Wood, *Vest Saves Officer in Drug Raid*, Chi. Trib., Nov. 1, 1986, at 7 (officer shot and occupant killed in gunfight that erupted after police knocked and identified themselves as police officers before entering); Marcida Dodson and Jerry Hicks, *Santa Ana Undercover Officer Shot in Face During Drug Bust*, Los Angeles Times, July 13, 1986, section one, at 25 (officers announced in English and in Spanish; and when no one answered, officer who broke through the door with battering ram was shot in the face by suspect who opened fire immediately); Joan Fleischman and Peter Hamm, *Machete-Armed Suspect Killed by Reserve Cop*, Miami Herald, Jan. 15, 1986, at 1B (after police announced, the suspect refused to answer the door; and when police entered the suspect attacked an officer with a machete and the officer shot the suspect); Ray Perez, *Suspect Killed, Officer Wounded in Shoot-Out*, Los Angeles Times, March 22, 1985, at 1, pt. 2 (after eight to ten officers surrounded the house, the suspect shot through a window, wounding an officer); and Michael H. Cottman, *2 Officers Shot in Gun Battle, Suspect Police Sought to Serve with Drug Warrant Wounded*, Miami Herald, July 26, 1984, at 1C (gun battle started after police identified themselves in English and Spanish, said they had search warrants and no one inside answered; and after door was knocked down, two officers wearing bulletproof vests were wounded in the battle that erupted).

The danger confronting the police during narcotics investigations is also reflected in the number of officers killed in drug-related situations. The following chart is based on reports of law enforcement officers killed in the years 1988 through 1994 found in the annual U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted documents. In those years, 490 officers were killed. Of those, 52 were killed while involved in drug-related investigations. The deaths came in a variety of circumstances, such as during the execution of search warrants, during undercover investigations, during traffic stops where drugs were later found in the cars and other situations involving drugs. The chart indicates the total number of officers killed in the year and the number killed in various drug related situations.

Year	Total offcrs killed	Executing search warrant	Undercover and other investig'n	Traffic stops drugs found	Retaliatory shooting
1994	76	0	4	0	0
1993	70	4	2	1	0
1992	63	2	1	0	1
1991	71	0	4	1	2
1990	66	2	5	2	0
1989	66	5	2	1	0
1988	78	3	10	0	0
Total	490[3]	16[4]	28[5]	5[6]	3[7]

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[3]The totals of officers killed can be found at page 31 of *Law Enforcement Officers Killed and Assaulted 1994.*

[4]The reports of officers killed while executing search warrants can be found at the following pages of the respective annual issues of *Law Enforcement Officers Killed and Assaulted*: 1993 at 41, 47, 50 and 57; 1992 at 42-43 and 47; 1990 at 23 and 30; 1989 at 26-27 (three victims), 37 and 43; and 1988 at 24, 29 and 31.

That the number of drug-related deaths in the four year period of 1991-94 is less than the number for the three year period of 1988-90 does not mean that the danger is lessening. In 1990, researchers attributed the drop in police deaths to better officer training and in the increased use of bullet-resistant vests. Newsweek, *Arms Race on Hill Street*, Nov. 19, 1990, at 58. Yet, of the 52 officers killed, 23 were wearing protective vests or body armor.[8]

Based on the drug arrest rate, drug-related crime and violence will continue. "The current drug problem began to emerge in the early 1980s and then accelerated

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[5]The reports of officers killed while involved in undercover and other investigations can be found at the following pages of the respective annual issues of *Law Enforcement Officers Killed and Assaulted*: 1994 at 43, 44, 49 and 55; 1993 at 49 and 54; 1992 at 52; 1991 at 45, 46 and 49 (two victims); 1990 at 23, 25, 31, 32 and 33; 1989 at 35-36 and 32; and 1988 at 24, 25 (two victims), 26, 30, 31, 33, 35 and 37.

[6]The reports of officers killed while involved in traffic stops where drugs were later found can be found at the following pages of the respective annual issues of *Law Enforcement Officers Killed and Assaulted*: 1993 at 52; 1991 at 37; 1990 at 35 (two victims); and 1989 at 40.

[7]The reports of officers killed in retaliation for their drug investigations can be found at the following pages of the respective annual issues of *Law Enforcement Officers Killed and Assaulted*: 1992 at 52-53; and 1991 at 44 and 47.

[8]The summaries of the cases where the officers wore vests are found at the following pages in the respective annual report of *Law Enforcement Officers Killed and Assaulted*: 1994 report at 49; 1993 report at 41, 47 and 57; 1992 report at 42-43 and 47; 1991 report at 49; 1990 report at 23, 25 and 30; 1989 report at 26 (two victims), 27, 32, 40 and 43; and 1988 report at 24 (two victims), 29, 30, 31, 33 and 35.

significantly in the mid-80s." Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. Crim. L. & Criminology 10, 28 (1995). "The drug arrest rate accelerated appreciably after 1985 with the wide distribution of crack-cocaine." *Id.*

As pointed out by the Wisconsin Supreme Court, a large problem for the police is the sophisticated weapons used by the drug dealers. *Richards*, 201 Wis. 2d at 855, 549 N.W.2d at 225. Drug dealers have semi-automatic and automatic weapons, Uzis and assault rifles. Newsweek, *Arms Race on Hill Street*, Nov. 19, 1990, at 58; The Police Chief, *Drug Dealers' Sophisticated Weaponry Poses Continuing Threat*, March 1988, at 47; Newsweek, *The Drug Gangs*, March 28, 1988, at 20.

Not only are sophisticated weapons available to drug dealers, there is an increase in the distribution of guns. One case reported that a 1973 study showed that ten percent of drug suspects arrested in Washington, D.C., were armed. *United States v. White*, 648 F.2d 29, 35 n.29 (D.C. Cir. 1981). Recent studies reveal more widespread access to guns. A study revealed that, among arrestees who admitted selling illegal drugs in the previous year, 25 percent reported they carried a gun all or most of the time. *Arrestees and Guns: Monitoring the Illegal Firearms Market*, National Institute of Justice, Research Preview, September 1995. Another survey of arrestees in eleven major urban areas revealed that 42 percent of drug sellers admitted using a gun to commit a crime. *Illegal Firearms: Access and Use By Arrestees*, National Institute of Justice, Research in Brief, January 1997, at 1 and 3.

Police experience finds that guns are frequently found at the locations of drug search warrants. *Stevens*, 181 Wis. 2d at 420, 511 N.W.2d at 593 (officer found guns in 85 to 90 percent of the 90 drug searches he had done); *State v. Guy*, 172 Wis. 2d 86, 92, 492 N.W.2d 311, 313 (1992) (officer found weapons in most of the 300 to 400 drug

search warrants he executed); *State v. Harris*, 95 N.C. App. 691, 693, 384 S.E.2d 50, 51 (1989) (officers said weapons were found on or near suspects in 85 to 98 percent of the narcotics searches in which they participated); and *State v. Stalbert*, 99 Or. App. 582, 586, 783 P.2d 1005, 1007 (1989) (officer testified that in 80 to 90 percent of the drug raids that he had been involved in, weapons were found). In 1986, the police department executed 127 drug search warrants in one area of New York City and recovered 126 firearms. The Police Chief, *Guns, Drugs and Violence, An Unholy Alliance*, by Benjamin Ward, Police Commissioner, New York City Police Department, New York, March 1988, at 52.

As evidenced by the number of police killed in drug-related circumstances, not only do the drug dealers have sophisticated weapons, they use them. In 1989, Francis C. Hall, commander of the New York City Police Department's narcotics division, said, "Drug suspects don't surrender any more. They fight, they grab you, and a lot of them will kill you if they can." New York Times, *THE REGION - Q & A: New York's Drug Commander; Report From the Field On an Endless War*, March 12, 1989, sec. 4 at 1. He said that the people involved in drug trafficking have a total lack of fear of law enforcement. *Id.* Other comments regarding the willingness of drug suspects to fight the police are found in Newsweek, *On the Firing Line*, May 29, 1989, at 32; Time, *The Other Arms Race; America's Streets Become Free-Fire Zones as Police, Criminals and Terrified Citizens Wield More and Ever Deadlier Guns*, Feb. 6, 1989, at 20; and Newsweek, *Losing the War?*, March 14, 1988, at 16.

These facts support the Wisconsin Supreme Court's statement that "[p]olice officers face an unquantifiable risk of violence every time they go into a house to execute a search warrant." *Richards*, 201 Wis. 2d at 850, 549 N.W.2d at 223 (footnote omitted). They also demonstrate the risk police officers take when they enter a residence to

execute a drug search warrant. The Wisconsin Supreme Court, quoting from Note, D. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant Is an Idea Whose Time Has Come*, 64 Notre Dame L. Rev. 552, 566 (1989), pointed out in *Richards*, 201 Wis. 2d at 852, 549 N.W.2d at 223-24, that the risk is increased when the officers knock and announce before entering:

> [A] police officer making a high-risk warrant entry is at a severe disadvantage. When he announces authority and purpose he makes himself readily identifiable. The suspect, concealed inside a house, will generally be able to see the officer, or know where the officer is since he is most often near the door. Even if the officer can see occupants inside the house, he does not know if they intend to resist unless they are naive enough to reveal their violent intentions. The officers are most vulnerable when entering the house. If the announcement has given the [suspect] time to arm himself, all he needs to do is aim his firearm at the door and wait for a target to appear.

The rationale of the Wisconsin Supreme Court in *Richards*, 201 Wis. 2d at 850-60, 549 N.W.2d at 223-27, and the facts cited here demonstrate that the governmental interest in police safety weighs heavily in favor of the bright-line rule that was reaffirmed in *Richards*.

The other governmental interest relied upon by the Wisconsin Supreme Court is crime detection and prevention in the context of preventing the destruction of evidence. The court in *Richards*, 201 Wis. 2d at 856, 549 N.W.2d at 225, noted that in *Stevens*, 181 Wis. 2d at 425, 511 N.W.2d at 591, it had recognized

> that the "easily disposable nature of narcotics provides police with evidence sufficient to form a reasonable belief that no-knock entry is necessary to prevent the destruction of evidence."

The concern that suspects will destroy evidence, or at least attempt to destroy evidence, is supported by the ease with which drugs can be destroyed and by the testimony of police officers who have found in their experience that occupants attempt to destroy the evidence when the officers announce their presence prior to entry. *United States v. Wilson*, 899 F. Supp. 521, 529 (D. Kan. 1995); *United States v. Murcer*, 849 F. Supp. 288, 294 (D. Del. 1994); *Henson v. State*, 236 Md. 518, 523, 204 A.2d 516, 519-20 (Ct. App. 1964); *State v. Meyer*, 209 Neb. 757, 760-61, 311 N.W.2d 520, 522 (1981); *Robinett v. Carlisle*, 928 S.W.2d 623, 627 n.5 (Tex. Ct. App. 1996).

In *State v. Loucks*, 209 N.W.2d 772, 777 (N.D. 1973), the court, in upholding a no knock entry, said it could take judicial notice that drugs may be easily destroyed. In *People v. Lujan*, 174 Colo. 554, 559, 484 P.2d 1238, 1241 (1971), the court found that it would always be true that giving notice would give the police reason to believe that narcotics would be destroyed.

Other cases demonstrate the destructibility of narcotics because, when the police entered, they found the suspects disposing of the drugs in the toilet. *Wilson v. Arkansas*, 115 S. Ct. at 1916; *United States v. Bonner*, 874 F.2d 822, 823 (D.C. Cir. 1989); *United States v. Carter*, 566 F.2d 1265, 1267-68 (5th Cir. 1978); and *Stalbert*, 99 Or. App. at 584, 783 P.2d at 1006.

Even if the occupants are unable to destroy all of the evidence, they can benefit their own interests by disposing of as much of the narcotics as possible. In Wisconsin, the penalties for various drug crimes vary depending upon the quantity of the drug involved. *See, e.g.*, Wis. Stat. §

961.41(1) (1995-96) (R-Ap. at A1-5). Thus, even if the occupants cannot destroy all of the drugs, they may lessen their penalties by destroying some.

The cases cited above demonstrate the accuracy of this Court's statement in *Summers*, 452 U.S. at 702, that "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to . . . frantic efforts to conceal or destroy evidence." As also noted by the Court in *Summers*, 452 U.S. at 702-03, the risk of harm to the police and the occupants (and also to the evidence) "is minimized if the officers routinely exercise unquestioned command of the situation." The Wisconsin Supreme Court in *Richards*, 201 Wis. 2d at 856-57, 549 N.W.2d at 225, found that allowing the police to take command by making a no knock entry protects the safety of the officers and enables the officers to seize the evidence of the drug dealing. The no knock entry, therefore, achieves the goal cited in *Summers* of minimizing the risk to the police, the occupants and the evidence.

No knock entries also promote the governmental interest in preventing escape. This point was vividly demonstrated in this case when the police found the defendant and his companion going out the window as the police entered the room. Had the police waited any longer before entering, the defendant might well have eluded them.

3. When the police execute a search warrant for evidence of drug dealing, the individual's interests served by announcement are minimal.

Against the governmental interests in no knock entries must be balanced the interests of the individual that are protected by an announcement. The individual has three

interests: privacy in the home; avoiding violence; and avoiding the destruction of property. Of the three interests, courts have shown the most concern for protecting individual privacy. *United States v. Francis*, 646 F.2d 251, 258 (6th Cir. 1981).

The search warrant authorizes "a substantial invasion of the privacy of the persons who" reside at the location to be searched. *Summers*, 452 U.S. at 701.

Because drugs could be hidden anywhere in the home, the warrant entitles the police to search everywhere in the home because the warrant entitles the police to search everywhere that the drugs could be hidden. *United States v. Ross*, 456 U.S. 798, 820-21 (1982).

After the police knock and announce their presence and purpose, the occupant has only ten seconds of privacy remaining because numerous courts have concluded that the police have a right to forcibly enter the home if the occupant has not responded within ten seconds of the announcement. *United States v. Myers*, No. 96-3105, 1997 WL 43843, *3 (D. Kan. Feb. 5, 1997); *United States v. Gatewood*, 60 F.3d 248, 249-50 (6th Cir. 1995); *United States v. Kemp*, 12 F.3d 1140, 1142 (D.C. Cir. 1994); *United States v. Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993); *United States v. Wysong*, 528 F.2d 345, 348 (9th Cir. 1976); *United States v. Phelps*, 490 F.2d 644, 647 (9th Cir. 1974); *United States v. Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973); *People v. Saechao*, 129 Ill. 2d 522, 533-34, 136 Ill. Dec. 59, 544 N.E.2d 745, 750 (1989); and *State v. Jones*, 15 Wash. App. 165, 166-67, 547 P.2d 906, 907-08 (1976).

The limited privacy right enjoyed by the occupant was discussed in *Richards*, 201 Wis. 2d at 858, 549 N.W.2d at 226, quoting from Sonnenreich and Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 St. John's L. Rev. 626, 647 (1970):

> It is difficult to see, however, what actual protection is given to any right of privacy by the announcement rule. Once identity and purpose are stated, entry must always be permitted; if permission is denied, or even delayed for an inordinate amount of time, entry may be forced, provided the officer has a valid purpose in gaining admission. Since no discretion is vested in the occupant, in what manner does notice protect his privacy? . . .
>
> Thus balanced, the protections to privacy seem to be somewhat tenuous when compared to the potential for public harm. This is particularly true with respect to potential destruction of evidence, especially when one considers that the probable cause requirement would have to be met in any event.

The occupant's right of privacy, therefore, is a very limited one that he or she can have no expectation of enjoying for more than ten seconds after the announcement.

The individual's property interest is also minimal when considered in the context of the history of the rule of announcement. At the inception of the rule in seventeenth century England, "doors and window shutters could not be easily replaced, and, if damaged, they could not shield the homeowner from the severe dangers outside." *Announcement in Police Entries*, 80 Yale L.J. at 142. The request to enter from the official gave the property owner the opportunity to protect his "bulwark of safety from being destroyed." *Id.*

Because doors and windows can be easily and quickly repaired today, the individual's property interest is much less now than at the inception of the rule of announcement.

The individual's final interest is in avoiding harm to himself or herself. However, the occupant shares that concern equally with the police officer. If a no knock entry is safer for the officer, it is also safer for the occupant. If the no knock entry reduces the chances that the officer will be confronted by violence, the no knock entry also means the occupant will be less likely to start the violence. By the no knock entry, the police can exercise command of the situation as soon as possible and, thereby, minimize the risk to themselves and to the occupants.

4. Governmental interests outweigh the limited individual interests to render the bright-line rule reasonable.

In *Maryland v. Wilson*, 65 U.S.L.W. at 4126, this Court concluded that the danger to an officer from a traffic stop outweighed the minimal intrusion imposed upon a passenger who is ordered out of the car; and the Court approved the blanket rule that authorizes an officer making a traffic stop to order passengers as well as the driver to get out of the car pending completion of the stop.

In this case also, because the governmental interests in officer safety and crime detection and prevention outweigh the interests of the occupants, the bright-line rule reaffirmed by the Wisconsin Supreme Court in *Richards* satisfies the reasonableness test under the Fourth Amendment.

The occupant's privacy interests are greatly diminished because the police have a warrant authorizing them to search everywhere that drugs can be found; and, if the police knock and announce, they can still forcibly enter the home if the occupant does not get to the door in ten seconds. The occupant's property interest is not as significant as when the rule of announcement was

formulated because repairing damaged property is not a difficult task in these times. Finally, the occupant's safety interest is the same as the officers'.

The governmental interests in protecting officer safety and preventing the destruction of evidence to detect and prevent crime are real and significant when the police execute a search warrant for evidence of drug dealing at the dealer's dwelling. The chances are great that the dealer will have a gun and the willingness to use it when the police knock and announce their identity before entering the home to search for the contraband and other evidence of drug dealing. The chances are even greater that the drug dealer will attempt to destroy the narcotics if the police announce their identity and presence and allow the occupant time to answer the door before the police enter. Instead of answering the knock, it is easy for the drug dealer to destroy the evidence. As this Court pointed out in *Summers*, 452 U.S. at 702-03, the risks of harm to the officers and to the occupants are minimized "if the officers routinely exercise unquestioned command of the situation." Because the bright-line rule reaffirmed by the court in *Richards* enables the police to take command of the situation as soon as possible when they execute a search warrant for evidence of drug dealing, the rule is reasonable under the Fourth Amendment.

The defendant criticizes the bright-line rule because, he claims, there are no effective remedies for mistakes. Petitioner's Brief at 32-33.

Contrary to the defendant's suggestion, remedies are available if the police err. For some police errors, the aggrieved party is able to seek relief pursuant to 42 U.S.C. § 1983. *Bonner v. Anderson*, 81 F.3d 472 (4th Cir. 1996) (police officer's motion for summary judgment properly denied); *Buonocore v. Harris*, 65 F.3d 347, 351 (4th Cir. 1995) (police officer's motion for summary judgment properly denied); *Fontenot v. Cormier*, 56 F.3d 669, 673,

676 (5th Cir. 1995) (plaintiff awarded compensatory and punitive damages for officers' warrantless entry into home); *Hartsfield v. Lemacks*, 50 F.3d 950 (11th Cir. 1995) (police officer not entitled to summary judgment when he led other officers to wrong house to execute search warrant); and *Baker v. Monroe Township*, 50 F.3d 1186 (3rd Cir. 1995) (officer in charge was not entitled to summary judgment against claims of Fourth Amendment violations for excessive use of force and wrongful search of a plaintiff). The desire to avoid the consequences of civil litigation will motivate the police to use their authority under a bright-line rule cautiously.

The dangers inherent in unannounced home entries provide the strongest motivation for the police to knock and announce when it is prudent to do so. As the court explained in *State v. Valentine*, 264 Or. 54, 67-68, 504 P.2d 84, 90 (1972), "police self-interest should dissuade police from making entries" in violation of the rule of announcement. In their own interest, the police want to enter in the safest possible manner. If knocking and announcing is not safe, the police should not be required to do it.

The bright-line rule reaffirmed by the Wisconsin Supreme Court permits the police to choose the safest method for entering the residence. *Richards*, 201 Wis. 2d at 856-57, 549 N.W.2d at 225. The method of entry that is safest for the police is also safest for the occupants because, if fighting breaks out, both sides can suffer casualties. Because the governmental interests of safety and crime prevention promoted by the bright-line rule outweigh the interests of the individual, the rule reaffirmed by the Wisconsin Supreme Court in *Richards* passes the reasonableness rule in *Maryland v. Wilson* and the rule is in compliance with the Fourth Amendment.

5. Under the bright-line rule in *Richards*, the police entry in this case was reasonable.

Under the rule reaffirmed in *Richards*, the police can enter a residence without knocking and announcing their identity and purpose when they are executing a search warrant for evidence of drug dealing. The police were executing such a warrant in this case.

The affidavit, which was submitted in requesting the warrant and which was based on information from an informant and police records, showed that the defendant and others engaged in the same conduct drug traffickers do by paying for a motel room with cash in advance, by refusing room service and by making and receiving numerous telephone calls in their room (J.A. 5). In addition, after the defendant and his companions left one room, police found in the room clear plastic sandwich bags like the ones used as a packaging material for cocaine (J.A. 6). Police records showed that the defendant had previously been arrested while possessing sixty-three packets of cocaine (J.A. 6). Because this information and the other statements in the affidavit provided the probable cause to believe that the defendant was engaged in drug dealing, the bright-line rule reaffirmed in *Richards* authorized the police to make a no knock entry to execute the warrant. Because the entry was authorized by a rule that passes the Fourth Amendment reasonableness test, the entry was reasonable.

C. When police execute a warrant to search a dwelling for evidence of drug dealing and they do not know the amount of drugs at the dwelling or whether the drug dealer has weapons, an unannounced entry is reasonable under *Wilson v. Arkansas*.

Even if this Court concludes that the governmental interests protected by the bright-line rule in *Richards* do not justify such a rule, the entry into the defendant's room in this case was reasonable under the circumstances known to the police before they went to the room. If a bright-line rule is not appropriate, the test for reasonableness is related in the recent decision of this Court in *Robinette*, 117 S. Ct. at 421, where the Court emphasized "the fact-specific nature of the reasonableness inquiry."

An unannounced entry to execute a search warrant is reasonable when the police have reason to believe that announcement will present a threat to their safety, flight by the suspect or the destruction of evidence. *Wilson v. Arkansas*, 115 S. Ct. at 1918-19.[9] Police have "reason to believe" when they have sufficient particular information to provide reasonable suspicion that announcement will present a threat to safety, the flight of the suspect or the destruction of evidence. As illustrated in the context of "stop and frisk" cases," the particularity requirement is satisfied by the nature of the crime being investigated. Just as the police have reason to frisk a person they suspect of being a drug dealer, they have reasonable suspicion to support an unannounced entry when they

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[9]As this Court explained in *Wilson v. Arkansas*, 115 S. Ct. at 1919, there can be other circumstances under which an unannounced entry is reasonable; but the threat to safety, the flight of the suspect and the destruction of the evidence were the only ones expressly addressed by the Court in that case.

have a search warrant, supported by probable cause, that shows the dwelling houses a drug dealer. As long as the information available to the police demonstrates that the suspect is a drug dealer, an unannounced entry to execute the search warrant for evidence of drug dealing is reasonable. In this case, the entry was reasonable because, even though the police did not have information showing that the defendant had weapons or that showed the amount of drugs expected to be found in the room, the police had information providing probable cause to believe the defendant was a drug dealer .

In *Robinette*, 117 S. Ct. at 421, this Court said: "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." The Court explained that, in applying the test, it emphasized "the fact-specific nature of the reasonableness inquiry." *Id.*

The "reasonableness" in a particular situation "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The constitutional reasonableness of police action does not depend on the actual motivations of the individual officers. *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996).

Usually reasonableness requires satisfaction of a probable cause requirement. *Buie*, 494 U.S. at 331. In some situations, however, the satisfaction of the lower "reasonable suspicion" standard renders the police action reasonable. *See, e.g., Terry v. Ohio.*

To assess the reasonableness of the police entry in this case under the test in *Robinette*, the first question that must be addressed is what level of justification (probable cause or reasonable suspicion) the Fourth Amendment requires to render a no knock entry reasonable. As explained in *Place*, 462 U.S. at 703, the balancing test is employed to determine the level of justification:

> The exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of "the Fourth Amendment's general proscription against unreasonable searches and seizures." We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.

(Citation omitted.) *See also Michigan v. Summers*, 452 U.S. at 699-700 (some seizures constitute such limited intrusions on personal security that they are justified by law enforcement interests on less than probable cause as long as police have an articulable basis for suspecting criminal activity).

The individual and governmental interests to be balanced are the same ones considered in applying the *Maryland v. Wilson* balancing test to evaluate a bright-line rule. The primary governmental interests are the safety of the officers, the detection and prevention of crime by preventing the destruction of evidence and the prevention of the flight of the suspects. The primary interests of the individual are privacy, safety and protection of property.

In *Buie,* this Court conducted the balancing test in a case with interests similar to those in this case. The issue in *Buie* was the level of justification the police needed to make a protective sweep of a home after arresting a suspect. *Buie*, 494 U.S. at 327, 330. The Court considered the danger the police face when going into the suspect's

home and pointed out that the officer is at a disadvantage because he is on his adversary's "'turf.'" *Buie*, 494 U.S. at 333. The Court noted that an ambush in an unknown configuration was more to be feared than one in open, more familia. surroundings. *Id.* The Court said that the arresting officers are permitted to take reasonable steps to ensure their safety after, and while making, the arrest; and that safety interest was found to be sufficient to outweigh the intrusion the procedures might entail. *Buie*, 494 U.S. at 334. The Court held that, after making the arrest, the police could conduct a protective sweep of the residence if they had articulable facts and rational inferences from those facts "that would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Buie*, 494 U.S. at 334.

In *Terry*, 392 U.S. at 20-27, the Court conducted a balancing test and concluded that governmental interests in officer safety and crime detection justified officers stopping and frisking suspects if the lower reasonable suspicion standard was met. The Court explained that the officer could pat down the suspect for weapons

> where he [the officer] has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Terry, 392 U.S. at 27.

In the context of the execution of search warrants, governmental interests in the safety of the officers and the

detection and prevention of crime outweigh the individual's interests so that the police can make an unannounced entry to execute a warrant if they have reasonable suspicion that announcement of identity and purpose would result in a threat to their safety or the safety of others, or the flight of the suspect or the destruction of evidence. Because reasonable suspicion has been described as "'a particularized and objective basis' for suspecting . . . criminal activity," *Ornelas v. United States*, 116 S. Ct. 1657, 1661 (1996), the police would be entitled to make the no knock entry if they had a particularized and objective basis for suspecting that an announcement would result in a threat to safety, the flight of the suspect or the destruction of evidence.

The defendant in this case appears to agree that the reasonable suspicion test applies to the officers' entry into the residence because at the end of his brief he contends that the test in *Buie* should apply. Petitioner's Brief at 41-44.[10]

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[10]The Brief *Amicus Curiae* of the American Civil Liberties Union at 25-26 n.39, contends that the standard should be probable cause rather than reasonable suspicion. The Brief *Amicus Curiae* admits that the reasonable suspicion standard has been applied where confrontations raise legitimate concerns for officer safety. *Id.* at 26 n.39.

The authority cited by the Brief *Amicus Curiae* to support the use of the probable cause standard is not applicable to the execution of search warrants. The cases cited all involved warrantless entries. *Minnesota v. Olson*, 495 U.S. 91 (1990); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *United States v. Santana*, 427 U.S. 38 (1976); *Warden v. Hayden*, 387 U.S. 294 (1967); *McDonald v. United States*, 335 U.S. 451 (1948); and *Johnson v. United States*, 333 U.S. 10 (1948). In those cases, where the exigent circumstances substituted for a warrant, it is logical to require the probable cause standard to be satisfied. When, however, the police have a warrant, governmental interests in safety and crime prevention dictate that only the

The information available to the police before they entered the defendant's room satisfied the reasonable suspicion test to justify a no knock entry. The information is contained in the Complaint for Search Warrant, which provided probable cause to believe that evidence of drug dealing would be found in the defendant's room (J.A. 2-8). In other words, the information that provides probable cause to believe that evidence of drug dealing will be found at the residence also provides the necessary particularized and objective basis for suspecting that a knock and an announcement of police identity and purpose prior to entry will result in a threat to the safety of the officers and the destruction of the evidence. Thus, the nature of the crime of drug dealing provides the necessary reasonable suspicion.

In at least two cases, this Court has recognized that the applicable level of justification is satisfied by the nature of the crime being investigated.

In *Terry*, 392 U.S. at 28, the Court explained that, where the police officer could conclude that defendants were acting in a manner consistent with a stick-up, a reasonably prudent man would be warranted in believing the defendants were armed and, thus, presented a threat to the officer's safety. The Court said that the actions of Terry and Chilton were consistent with the officer's hypothesis that the men were contemplating a daylight robbery -- which, it is reasonable to assume, would be likely to involve the use of weapons. *Id.* In other words, the nature of a day-time robbery provided the basis for the frisk.

In *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985), this Court explained when a police officer could use deadly force to seize a suspect. An officer can use deadly force when he

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reasonable suspicion standard need be satisfied to justify the no knock entry to execute the warrant.

or she has probable cause to believe that the suspect poses a threat of serious physical harm to the officer or others. The probable cause standard was satisfied where the officer gave some warning, if feasible, and the suspect threatened the officer with a weapon or there was probable cause to believe that the suspect had committed a crime involving the infliction of serious physical harm. *Id.*

In *Garner*, then, the nature of a suspected crime could provide the officer with the necessary level of justification to use deadly force.

When the police have a warrant to search for evidence of drug dealing, the nature of the crime of drug dealing gives the police reasonable suspicion to believe that they will face a threat to their safety and that the suspect will attempt to destroy the evidence if the police knock and announce their identity and presence. Under these circumstances, entry without announcement is reasonable under *Wilson v. Arkansas*.

Courts in a series of cases have concluded that when police suspect someone of drug dealing they have the necessary particular facts to justify a frisk because of the known connection between drug dealing and weapons and violence. In *United States v. McMurray*, 34 F.3d 1405, 1410 (8th Cir. 1994), the court held:

> The officers' reasonable suspicion that McMurray was dealing drugs provides an adequate basis for them to reasonably believe that he might be armed and dangerous, because "weapons and violence are frequently associated with drug transactions." *United States v. Brown*, 913 F.2d 570, 572 (8th Cir. 1990).

Other cases finding the frisk was justified after the officer had reason to believe the suspect was a drug dealer are *United States v. Brown*, 913 F.2d 570, 572 (8th Cir.

1990) (frisk justified because "weapons and violence are frequently associated with drug transactions"); *United States v. Salas*, 879 F.2d 530, 535 (9th Cir. 1989) (it "is not unreasonable to assume that a dealer in narcotics might be armed"); *United States v. Nersesian*, 824 F.2d 1294, 1317 (2nd Cir. 1987) (reasonable to assume that suspected narcotics courier who carries money and narcotics might carry a weapon; and firearms are as much tools of the narcotics trade as commonly recognized narcotics paraphernalia); *United States v. Clark*, 754 F.2d 789, 792 (8th Cir. 1985) ("it is common knowledge among drug enforcement personnel that narcotics dealers are likely to carry firearms"); and *United States v. Vasquez*, 634 F.2d 41, 43 (2nd Cir. 1980) (frisk justified, "particularly in view of the violent nature of narcotics crime").

In *United States v. Post*, 607 F.2d 847, 851 (9th Cir. 1979), the court compared a suspected drug dealer with the suspect in *Terry* and said that, just as it was reasonable to assume from the nature of the offense that Terry was dangerous, it "is not unreasonable to suspect that a dealer in narcotics might be armed."

At least three cases have pointed out that the reasonable suspicion that the suspect is armed and dangerous is based on the crime involved; and, in each of the cases, the courts found that the nature of the crime of drug dealing provided the necessary reasonable suspicion to justify the frisk of the suspect. *Vasquez*, 634 F.2d at 43; *Post*, 607 F.2d at 851; and *United States v. Oates*, 560 F.2d 45, 62 (2nd Cir. 1977).

If *reasonable suspicion* that the suspect is a drug dealer provides the police with the particularized and objective information they need to frisk the suspect, then a warrant for evidence of drug dealing that is based on *probable cause* provides the police with particularized and objective information that they face a threat of harm from the drug

dealer when they execute the search warrant. This information justifies the no knock entry.

Finding the no knock entry reasonable because of the connection between drug dealing and guns and violence is consistent with decisions of federal courts in other areas. When suspects are charged with drug offenses, guns are admissible as relevant evidence because they are tools of the trade. *United States v. Ramirez*, 45 F.3d 1096, 1103 (7th Cir. 1995); *United States v. Nixon*, 918 F.2d 895, 904 (11th Cir. 1990); *United States v. Alvarez*, 860 F.2d 801, 829-30 (7th Cir. 1988); *United States v. Payne*, 805 F.2d 1062, 1064-65 (D.C. Cir. 1986); and *United States v. Wiener*, 534 F.2d 15, 18 (2nd Cir. 1976). The connection between guns and drugs has also been given as the reason for permitting joinder of drug and gun charges, *United States v. Windom*, 19 F.3d 1190, 1197 (7th Cir. 1994), and for admitting guns as evidence of involvement in drug conspiracies, *United States v. Vegas*, 27 F.3d 773, 778 (2nd Cir. 1994); *United States v. Terzado-Madruga*, 897 F.2d 1099, 1120 (11th Cir. 1990); and *United States v. Green*, 887 F.2d 25, 27 (1st Cir. 1989).

The statistics regarding drug-related murders of police officers, the weapons available to drug dealers, the willingness of drug dealers to resist police and the continued rise of drug use, in addition to the judicially recognized connection between drugs and guns and violence, provide the police with particularized and objective information to show that they face the threat of danger when they execute a search warrant for drug dealing. Because the execution of the drug search warrant creates the circumstances that present a threat to the safety of the officers, a no knock entry is reasonable under the Fourth Amendment. The entry of the room in this case, which was made under the authority of the warrant to search for evidence of drug dealing, was reasonable.

The ease with which drugs are destroyed also provides the police with a particularized and objective basis to believe that, if they knock and announce before entering to execute a drug search warrant, the occupant will destroy evidence.

The particularized and objective basis for believing that knocking and announcing prior to entry to execute a drug search warrant will result in the destruction of evidence is based on experience and judicial notice. As noted earlier in this brief, police officers have testified that, in their experience, occupants attempt to destroy the evidence when the officers announce their presence prior to entry. *United States v. Wilson*, 899 F. Supp. at 529; *Murcer*, 849 F. Supp. at 294; *Henson*, 236 Md. at 523, 204 A.2d at 519-20; *Meyer*, 209 Neb. at 760-61, 311 N.W.2d at 522; and *Robinett v. Carlisle*, 928 S.W.2d at 627 n.5. A small sampling of other cases demonstrates that the police find the occupants disposing of the drugs in the toilets when the police enter. *Wilson v. Arkansas*, 115 S. Ct. at 1916; *Bonner*, 874 F.2d at 823; *Carter*, 566 F.2d at 1267-68; and *Stalbert*, 99 Or. App. at 584, 783 P.2d at 1006. Cases where courts took judicial notice of the ease with which drugs are destroyed to justify no knock entries include *Loucks*, 209 N.W.2d at 777, and *Lujan*, 174 Colo. at 559, 484 P.2d at 1240.

The police in this case came to the defendant's door to execute a search warrant for evidence of drug dealing. Because the search warrant and the information used to obtain it provided the police with reasonable suspicion to believe that they faced the threat of danger and the destruction of evidence if they knocked and announced their presence, they were authorized to enter without announcement. Under the circumstances of this case, where they knocked and gave the defendant an opportunity to open the door, their entry prior to announcing their purpose was reasonable under the Fourth Amendment and *Wilson v. Arkansas*.

D. The police entry into the defendant's room was reasonable because further announcement after the defendant closed and locked the door would have been a useless gesture.[11]

The entry in this case was reasonable for a third reason. The police knocked and the defendant opened the door (J.A. 38). However, after the defendant looked in the direction of the uniformed officer, the defendant closed the door and locked it (J.A. 38-39). The police then announced themselves as police officers and forced open the door (J.A. 39-40, 44-45). Prior to opening the door, the police had not announced their purpose (J.A. 66). Under these circumstances, the police entry was reasonable because, once the defendant closed the door after looking in the direction of the uniformed officer, further announcement and delay by the police would have been a "useless gesture."

This Court has recognized that completion of all the steps of the rule of announcement by the police is unnecessary when the police are virtually certain that the occupant knows their purpose "so that an announcement would be a useless gesture." *Miller v. United States*, 357 U.S. 301, 310 (1958). *See also Wilson v. Arkansas*, 115 S.

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[11]The Wisconsin Supreme Court did not reach the "useless gesture" issue because the court affirmed the conviction without having to consider the question. The State of Wisconsin briefed the issue before the Wisconsin Supreme Court, however; and Wisconsin raised the issue in this Court in the "Brief in Opposition to Petition for a Writ of Certiorari" at pages i and 11-12. This issue should be addressed by this Court, or the state supreme court on remand, if this Court does not affirm the Wisconsin Supreme Court on the basis of the bright-line rule or the ground that the police had reasonable suspicion to support an entry without announcement of their purpose.

Ct. at 1917, and *Ker v. California*, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting).

The court explained in *United States v. Tracy*, 835 F.2d 1267, 1270 (8th Cir. 1988), that announcement of purpose was excused when it constituted a useless gesture because the facts known to the officers justified them in being virtually certain the suspect already knew their purpose.

In *Commonwealth v. Antwine*, 417 Mass. 637, 639, 632 N.E.2d 818, 819 (1994), the court said that if the facts known to the police make it virtually certain that the occupant already knows the police's purpose, "the useless gesture exception excuses the police from full compliance with the rule" of announcement.

In this case, the police satisfied some of the requirements of the rule of announcement because they knocked and allowed the defendant time to come to the door. In addition, the presence of the uniformed officer satisfied the requirement that the police announce their identity. After opening the door, the defendant looked over the shoulder of Detective Pharo and saw the uniformed officer. The conclusion that he saw the uniformed officer is based on the evidence that he looked in the direction of the officer and Detective Pharo saw the defendant's expression change to one of surprise (J.A. 37-38, 40). In addition, after the defendant denied seeing the uniformed officer, the trial court found that the defendant's testimony was self-serving and lacking some credibility (J.A. 47, 54). The defendant's observation of the uniformed officer satisfied the requirement that the police announce their presence. *See State v. Anonymous (1984-1)*, 40 Conn. Sup. 20, 31, 480 A.2d 600, 606 (1984) ("Perhaps, in this case, where uniformed officers were at the door when it was partially open, an announcement of the presence of the police was unnecessary"); *Commonwealth v. Goggin*, 412 Mass. 200, 202, 587 N.E.2d 785, 787 (1992) ("Although the defendant on opening the door may have been surprised to

see a group outside, the identity of the police should have been immediately obvious to her from the badges around their necks"); and *State v. Ellis*, 21 Wash. App. 123, 128, 584 P.2d 428, 431 (1978) ("[a] prominently posted uniformed officer is a great aid in establishing the legitimacy of the announced identification, particularly when it comes at late and unusual hours as in the case before us").

Where the occupant closes the door in the face of a uniformed police officer, the police can be virtually certain that the occupant knows why they are there; and further announcement would be a useless gesture. *Lockwood v. State*, 591 P.2d 969 (Alaska 1979); and *State v. Berry*, 174 Wis. 2d 28, 496 N.W.2d 746 (Ct. App. 1993).

Because further announcement prior to entry would have been a useless gesture, the police entry was reasonable under the Fourth Amendment.

II. IF THE POLICE ENTRY INTO THE DEFENDANT'S ROOM WAS UNREASONABLE UNDER THE FOURTH AMENDMENT, SUPPRESSION OF THE EVIDENCE IS NOT THE PROPER REMEDY.[12]

If this Court concludes that the police failed to comply with the Fourth Amendment in entering the defendant's room, suppression of the evidence is not the proper remedy since the police were executing a search warrant issued by a neutral and detached magistrate.

For three primary reasons, application of the exclusionary rule is inappropriate: first, the evidence was seized under the authority of a valid warrant, not by exploitation of an illegality; second, because the warrant was based on information gathered prior to the entry, the source of the valid warrant was independent from an illegal entry; and, third, because the evidence was seized pursuant to a valid warrant, application of the exclusionary rule would put the police in a worse position than if they had complied with the rule of announcement.

Suppression of the evidence is not a proper remedy for a constitutional violation where "the evidence was not

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[12]The Wisconsin Supreme Court did not reach the issue of the application of the exclusionary rule to an entry that is unreasonable for lack of compliance with the rule of announcement because the court affirmed the conviction without having to address the question. The State of Wisconsin briefed the issue in the Wisconsin Supreme Court, however; and Wisconsin raised the issue in this Court in the "Brief in Opposition to Petition for a Writ of Certiorari" at pages i and 11-12. If this Court finds that the entry was unreasonable and in violation of the Fourth Amendment, the question of the applicability of the exclusionary rule should be considered by this Court or by the Wisconsin Supreme Court on remand.

"'come at by exploitation" of . . . the defendant's Fourth Amendment rights . . . .'" *New York v. Harris*, 495 U.S. 14, 19 (1990).

In this case, even if the police entry was unreasonable, the evidence should not be suppressed since the seizure of the evidence was not an exploitation of the entry. The evidence was seized under the authority of the search warrant that had been issued by the neutral and detached magistrate. Because the evidence was seized under the authority of the warrant, the police entry did not taint the seizure of that evidence. The only event that would have prevented the police from seizing the evidence would have been its destruction; and the defendant does not have a constitutional right to destroy the evidence. *Ker v. California*, 374 U.S. at 39, quoting *People v. Maddox*, 46 Cal. 2d 301, 306, 294 P.2d 6, 9 (1956).

In a dissenting opinion in *New York v. Harris*, Justice Marshall explained that the principal purpose of the exclusionary rule is to eliminate incentives for police officers to violate the Fourth Amendment and he noted: "A police officer who violates the Constitution usually does so to obtain evidence that he could not secure lawfully." *Harris*, 495 U.S. at 22 (Marshall, J., dissenting).

In *United States v. Crews*, 445 U.S. 463, 471 (1980), the Court also considered when suppression of evidence is proper and said: "Thus most cases begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity."

Again, under that standard, suppression is not proper in the instant case because the evidence was not the product of illegal governmental activity. The police did not have to act unlawfully to seize the evidence because its seizure was the product of the valid search warrant, not the mode or manner of entry.

In a case where the police searched a residence under the authority of a valid warrant after they had illegally entered the residence, this Court refused to suppress the evidence seized under the authority of the valid warrant. In *Segura v. United States*, 468 U.S. 796 (1984), the police illegally entered the defendant's apartment without a warrant and arrested the occupants. Police remained in the apartment for nearly twenty-four hours while other officers obtained a search warrant that was based on information the police possessed before they entered the apartment. The defendant sought to suppress evidence seized in the execution of the search warrant. The defendant argued that the evidence seized under the warrant should be excluded as "'fruit'" derived from the illegal entry. *Segura*, 468 U.S. at 813.

In rejecting the defendant's argument, the Court said that the legality of the entry was irrelevant where the source of the information on which the warrant was secured was unconnected with the entry and was known to the police before the entry. *Segura*, 468 U.S. at 813-14.

The Court later explained: "Suppression is not justified unless 'the challenged evidence is in some sense the product of illegal governmental activity.' *United States v. Crews*, 445 U.S., at 471." *Segura*, 468 U.S. at 815. The Court said suppression was not appropriate since the illegal entry into the apartment did not contribute in any way to the discovery of the evidence seized under the warrant.

The Court rejected the dissent's argument that had the police not entered the apartment the occupants could have removed or destroyed the evidence before the warrant issued. The majority of the Court refused to extend the exclusionary rule to protect criminal activity such as the destruction of evidence. *Segura*, 468 U.S. at 816.

The Court added: "The essence of the dissent is that there is some 'constitutional right' to destroy evidence. This concept defies both logic and common sense.'" *Segura*, 468 U.S. at 816.

The decision in *Segura* dictates that the exclusionary rule *not* be applied to evidence seized in the execution of the search warrant in this case even if this Court holds that the entry was unreasonable under the Fourth Amendment. As in *Segura*, the warrant was based on information obtained by the police before entering the residence. The warrant and the evidence seized under it were obtained wholly independent from the entry. The entry only prevented the occupants from destroying the drugs; and, as the Court made clear in *Segura*, the occupants did not have a constitutional right to destroy the evidence. Therefore, the exclusionary rule cannot be applied to protect their chance to destroy evidence. As made clear in *Segura*, because the evidence in this case was seized on a warrant independent from the entry, the exclusionary rule cannot be applied to the evidence obtained in the execution of the warrant.

If the exclusionary rule were applied where the police made a no knock entry to execute a valid search warrant, the lesson for the police, in light of *Segura*, would be to make the entry before obtaining the warrant, then get the warrant and return to the premises that are under the protection of the police. Such would be an anomalous result because the police would find it more to their advantage to plan an illegal entry prior to obtaining the warrant.

The exclusionary rule should not be applied when to do so would put the police in a worse position than they would have been if they complied with the constitutional requirements. *Murray v. United States*, 487 U.S. 533, 541 (1988). One reason for the exclusionary rule is to protect against the prosecution being put in a better position than

it would have been if no illegality had transpired. *Nix v. Williams*, 467 U.S. 431, 443 (1984). Under the independent source doctrine, evidence is not suppressed if it would have been discovered wholly independent of any constitutional violation.

> The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Nix, 467 U.S. at 443 (citations omitted).

In this case, even if the police entered the room illegally, the evidence was discovered and seized by a means wholly independent from the entry because it was discovered and seized in the execution of a valid search warrant. Had the police entered legally, the evidence would have been discovered and seized pursuant to the warrant. If the exclusionary rule were applied in this case, the police would be put in a worse position than if they had complied with the rule of announcement. To avoid putting the police in a worse position than if they complied with the rule, the evidence must be admitted at trial.

In summary, even if this court finds that the police entry in this case was unreasonable under the Fourth Amendment, suppression of the evidence is not the proper remedy because the evidence was seized under the authority of the valid search warrant, not out of exploitation of the entry.

CONCLUSION

For the reasons discussed above, the State of Wisconsin requests this Court to affirm the decision of the Wisconsin Supreme Court.

Respectfully submitted,

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APPENDIX

Wis. Stats. § 961.41(1) (1995-96) A1-5

961.41 Prohibited acts A—penalties. (1) MANUFACTURE, DISTRIBUTION OR DELIVERY. Except as authorized by this chapter, it is unlawful for any person to manufacture, distribute or deliver a controlled substance or controlled substance analog. Any person who violates this subsection with respect to:

(a) Except as provided in par. (d), a controlled substance included in schedule I or II which is a narcotic drug, or a controlled substance analog of a controlled substance included in schedule I or II which is a narcotic drug, may be fined not more than $25,000 or imprisoned for not more than 15 years or both.

(b) Except as provided in pars. (cm) and (e) to (h), any other controlled substance included in schedule I, II or III, or a controlled substance analog of any other controlled substance included in schedule I or II, may be fined not more than $15,000 or imprisoned for not more than 5 years or both.

(cm) Cocaine or cocaine base, or a controlled substance analog of cocaine or cocaine base, is subject to the following penalties if the amount manufactured, distributed or delivered is:

1. Five grams or less, the person shall be fined not more than $500,000 and may be imprisoned for not more than 10 years.

2. More than 5 grams but not more than 15 grams, the person shall be fined not more than $500,000 and shall be imprisoned for not less than one year nor more than 15 years.

3. More than 15 grams but not more than 40 grams, the person shall be fined not more than $500,000 and shall be imprisoned for not less than 3 years nor more than 20 years.

4. More than 40 grams but not more than 100 grams, the person shall be fined not more than $500,000 and shall be imprisoned for not less than 5 years nor more than 30 years.

5. More than 100 grams, the person shall be fined not more than $500,000 and shall be imprisoned for not less than 10 years nor more than 30 years.

(d) Heroin or a controlled substance analog of heroin is subject to the following penalties if the amount manufactured, distributed or delivered is:

1. Three grams or less, the person shall be fined not less than $1,000 nor more than $200,000 and may be imprisoned for not more than 15 years.

2. More than 3 grams but not more than 10 grams, the person shall be fined not less than $1,000 nor more than $250,000 and shall be imprisoned for not less than 6 months nor more than 15 years.

3. More than 10 grams but not more than 50 grams, the person shall be fined not less than $1,000 nor more than $500,000 and shall be imprisoned for not less than one year nor more than 15 years.

4. More than 50 grams but not more than 200 grams, the person shall be fined not less than $1,000 nor more than $500,000 and shall be imprisoned for not less than 3 years nor more than 15 years.

5. More than 200 grams but not more than 400 grams, the person shall be fined not less than $1,000 nor more than $500,000 and shall be imprisoned for not less than 5 years nor more than 15 years.

6. More than 400 grams, the person shall be fined not less than $1,000 nor more than $1,000,000 and shall be

imprisoned for not less than 10 years nor more than 30 years.

(e) Phencyclidine, amphetamine, methamphetamine or methcathinone, or a controlled substance analog of phencyclidine, amphetamine, methamphetamine or methcathinone, is subject to the following penalties if the amount manufactured, distributed or delivered is:

1. Three grams or less, the person shall be fined not less than $1,000 nor more than $200,000 and may be imprisoned for not more than 5 years.

2. More than 3 grams but not more than 10 grams, the person shall be fined not less than $1,000 nor more than $250,000 and shall be imprisoned for not less than 6 months nor more than 5 years.

3. More than 10 grams but not more than 50 grams, the person shall be fined not less than $1,000 nor more than $500,000 and shall be imprisoned for not less than one year nor more than 15 years.

4. More than 50 grams but not more than 200 grams, the person shall be fined not less than $1,000 nor more than $500,000 and shall be imprisoned for not less than 3 years nor more than 15 years.

5. More than 200 grams but not more than 400 grams, the person shall be fined not less than $1,000 nor more than $500,000 and shall be imprisoned for not less than 5 years nor more than 15 years.

6. More than 400 grams, the person shall be fined not less than $1,000 nor more than $1,000,000 and shall be imprisoned for not less than 10 years nor more than 30 years.

(f) Lysergic acid diethylamide or a controlled substance analog of lysergic acid diethylamide is subject to the

following penalties if the amount manufactured, distributed or delivered is:

1. One gram or less, the person shall be fined not less than $1,000 nor more than $200,000 and may be imprisoned for not more than 5 years.

2. More than one gram but not more than 5 grams, the person shall be fined not less than $1,000 nor more than $250,000 and shall be imprisoned for not less than 6 months nor more than 5 years.

3. More than 5 grams, the person shall be fined not less than $1,000 nor more than $500,000 and shall be imprisoned for not less than one year nor more than 15 years.

(g) Psilocin or psilocybin, or a controlled substance analog of psilocin or psilocybin, is subject to the following penalties if the amount manufactured, distributed or delivered is:

1. One hundred grams or less, the person shall be fined not less than $1,000 nor more than $200,000 and may be imprisoned for not more than 5 years.

2. More than 100 grams but not more than 500 grams, the person shall be fined not less than $1,000 nor more than $250,000 and shall be imprisoned for not less than 6 months nor more than 5 years.

3. More than 500 grams, the person shall be fined not less than $1,000 nor more than $500,000 and shall be imprisoned for not less than one year nor more than 15 years.

(h) Tetrahydrocannabinols, included under s. 961.14 (4) (t), or a controlled substance analog of tetrahydrocannabinols, is subject to the following penalties if the amount manufactured, distributed or delivered is:

1. Five hundred grams or less, or 10 or fewer plants containing tetrahydrocannabinols, the person shall be fined not less than $500 nor more than $25,000 and may be imprisoned for not more than 3 years.

2. More than 500 grams but not more than 2,500 grams, or more than 10 plants containing tetrahydrocannabinols but not more than 50 plants containing tetrahydrocannabinols, the person shall be fined not less than $1,000 nor more than $50,000 and shall be imprisoned for not less than 3 months nor more than 5 years.

3. More than 2,500 grams, or more than 50 plants containing tetrahydrocannabinols, the person shall be fined not less than $1,000 nor more than $100,000 and shall be imprisoned for not less than one year nor more than 10 years.

(i) A substance included in schedule IV, may be fined not more than $10,000 or imprisoned for not more than 3 years or both.

(j) A substance included in schedule V, may be fined not more than $5,000 or imprisoned for not more than one year or both.

(8)

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In The

Supreme Court of the United States

October Term, 1996

STEINEY J. RICHARDS,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Wisconsin

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ARGUMENT

I. THE QUESTION OF REASONABLENESS OF AN UNANNOUNCED FORCIBLE ENTRY INTO THE HOME REQUIRES A PARTICULARIZED EVALUATION OF THE FACTS OF EACH CASE, NOT JUST PIGEONHOLING IT AS A DRUG DELIVERY CASE.

A. Determining whether announcement is required requires a particularized evaluation of the circumstances in each case.

Whether or not an announcement is required is a reasonableness inquiry. *Wilson v. Arkansas*, 115 S.Ct. 1914, 1918, 1919 (1995). How a search is conducted is always a reasonableness inquiry. *Terry v. Ohio*, 392 U.S. 1, 18-19 (1968); *Dalia v. United States*, 441 U.S. 238, 258 (1979). In the protective sweep case, *Maryland v. Buie*, 494 U.S. 325, 334, 336, 337 (1990), the Court held that specific and articulable facts must be shown to authorize the police to look for others present in a home. *Buie* "offers guidance by analogy here" because it is the closest case on the law and facts. *Cf. Maryland v. Wilson*, No. 95-1268 (Feb. 19, 1997) slip op. 4.

In *Whren v. United States*, 116 S.Ct. 1769, 1776-77 (1996), the Court recognized balancing in the manner a probable cause-based seizure of a vehicle was conducted. A traffic stop is not "extraordinary" or "extreme" but an unannounced entry in the home is:

> Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests –

> such as, for example, seizure by means of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), unannounced entry into a home, see *Wilson v. Arkansas*, 514 U.S. ___ (1995), entry into a home without a warrant, see *Welsh v. Wisconsin*, 466 U.S. 740 (1984), or physical penetration of the body, see *Winston v. Lee*, 470 U.S. 753 (1985).

This Term, in *Ohio v. Robinette*, 117 S.Ct. 417, 421 (1996), the Court reiterated that, when Fourth amendment reasonableness is at issue, it

> is measured in objective terms by examining the totality of the circumstances.
>
> In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. Thus, in *Florida v. Royer*, 460 U.S. 491 (1983), we expressly disavowed any "litmus paper test" or single "sentence or . . . paragraph . . . rule," in recognition of the "endless variations in the facts and circumstances" implicating the Fourth amendment. *Id.*, at 506. Then, in *Michigan v. Chesternut*, 486 U.S. 567 (1988), when both parties urged "bright-line rules applicable to all investigatory pursuits," we rejected both proposed rules as contrary to our "traditional contextual approach." *Id.*, at 572-73. And again, in *Florida v. Bostick*, 501 U.S. 429 (1991), when the Florida Supreme court adopted a *per se* rule that questioning aboard a bus always constitutes a seizure, we reversed, reiterating that the proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter" *Id.* at 493.

Just five weeks before our argument, the Court applied this principle in *Maryland v. Wilson, supra*, slip op.

3. The court engaged in a balancing of interests to determine whether ordering passengers out of a car during a traffic stop was reasonable, and it concluded that it was. *Id.* at 4-6. *See* point I.B., *infra.*

The fact remains, however, both sides can marshall empirical evidence that supports their position. Police get shot, and innocent people get shot. This probably will continue no matter how this case comes out because police and citizens are killed right now both with and without announcement. But isn't that the point? We are dealing with a search that happens, in Justice Scalia's words from *Whren*, "in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." Petitioner believes that his proposed rule will save lives.

Because guns are "tools of the trade," Respondent and *amici* assume that drug dealers with guns have them just to shoot the police. Common sense suggests otherwise; the police are not the victims of violence in the cases they cite. Rather, the cases usually show that drug dealers carry guns to protect their valuable stash from those who would steal it or rob them of it.[1] *See, e.g., United States v. Sanchez-Barreto*, 93 F.3d 17, 19 (1st Cir.1996); *United States v. Singer*, 943 F.2d 758, 762 (7th Cir.1991) (inference of drug dealing found from possession of firearm and past threats); *United States v. Golter*, 880 F.2d 91, 93 (8th Cir.1989); *United States v. Alvarez*, 860 F.2d 801, 830 (7th Cir.1988) (gun "raised the inference that the cocaine was valuable to Ms. Rivera and, therefore,

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[1] Petitioner did not have a gun, and there is no suggestion that officers thought would find one when they searched.

that it was worth protecting"); *United States v. Sarda-Villa*, 760 F.2d 1232, 1234 n. 1 (11th Cir.1985); *State v. Williams*, 168 Wis.2d 970, 977, 485 N.W.2d 42, 44 (1992) ("According to the informant, Williams carried the gun because he had previously been threatened by another drug dealer.").[2] If the police announce their presence, then it is always going to be against the best interest of a drug dealer to engage in a shoot-out, just as it is in the best interest of police to avoid a shoot-out. The drug dealer foolish enough to resist will almost invariably be shot or killed. Balancing is mandated; too much is at stake for either side to have a blanket or *per se* rule.

The practical reality is that modern day police practices are such that the police bring overwhelming force to virtually every search warrant scene and use it whether or not announcement occurs. Here, there were apparently eight to ten officers for an unarmed man in a motel room. It is not surprising to see twenty or more officers show up for a drug raid along with the SWAT Team; sometimes there are a lot more. *See, e.g., United States v. Ramirez*, 91 F.3d 1297, 1299 (9th Cir.1996) ("45 armed officers" showed up at 6:15 a.m. raid while occupants were believed to be asleep). After all, the show of force is the whole point.

The Respondent suggests that *Michigan v. Summers*, 452 U.S. 692 (1981), is another example of a bright line rule which ought to persuade this Court to ratify the blanket exception adopted by the Wisconsin Supreme

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[2] The United States cites *State v. Stevens*, 181 Wis.2d 410, 511 N.W.2d 591, 596-97 (1994), *cert. denied*, 115 S.Ct. 2245 (1995), for this proposition (U.S.Br. 14 n. 6), but *Stevens* cites and relies on *Williams*.

Court. What the Respondent fails to acknowledge is that *Summers* does not deal with entry to a home or even the search of one. Rather, *Summers* allows the police to temporarily detain occupants present on the premises while a search warrant is being executed. It is, therefore, more analogous to *Maryland v. Wilson* than to the instant case.[3]

B. *Maryland v. Wilson* which authorizes the police to have passengers get out of a car during a traffic stop does not authorize a blanket rule in an unannounced entry of the home.

The Respondent argues that *Maryland v. Wilson* stands for the proposition that a bright line rule allowing the police to enter a home with a search warrant and without announcement is permissible under the Fourth Amendment. *Maryland v. Wilson* permits a lone police officer making a traffic stop to order passengers out of a vehicle in order to protect the officer's safety during the stop. This Court determined that there is only one limited change in circumstance occasioned by allowing police officers this authority: The passengers "will be outside of, rather than inside, the stopped car." *Id.*, slip op. 4. It is this extremely limited intrusion which, when balanced against the need for officer safety, permits this type of

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[3] A different, but related, situation exists with regard to searches of persons. For example, the public interest in prison and jail security allows the government to perform warrantless, suspicionless searches of persons entering such facilities. *See, e.g., Black v. Amico*, 387 F.Supp. 88 (W.D.N.Y.1974). However, this authority is not absolute. A strip search can never be justified by a blanket rule. Such a search must be based upon reasonable suspicion. *Hunter v. Auger*, 672 F.2d 668, 675-76 (8th Cir.1982).

seizure. *Maryland v. Wilson* has nothing to do with unannounced forcible entries of the home where the door is smashed in without announcement.

When the police *en masse* forcibly and unannounced enter a home, the level of intrusion is overwhelmingly and undeniably greater: Property is destroyed, the occupants, including children, spouses and guests, are intentionally frightened and intimidated by strange people pointing guns at them and threatening to shoot them if they even move.[4] Sometimes even stun grenades are lobbed in before they enter in this paramilitary operation. There are occupants who may be engaged in private intimate activities who are suddenly confronted by strangers waiving guns and shouting threats. *Hall v. Shipley*, 932 F.2d 1147 (6th Cir.1991) (Hall was engaged in intercourse with his girlfriend, and the officers in the raiding party mistook the sounds of their lovemaking for Hall attempting to flush drugs down the toilet; the drug offense he was allegedly guilty of was so minor compared to what he went through that he was not prosecuted). What greater search of the home can be envisioned by anyone?

All too often, the police or the occupants feel threatened enough to respond with violence. It is for this reason that the Fourth Amendment has always provided that the manner of entry is subject to special scrutiny. Simply put, it is wrong, dead wrong, to equate a momentary, public, non-violent detention at a roadside with a violent forcible entry by the government into one's home.

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[4] One innocent man, a preacher, died of a heart attack after being chased through his house by police after a raid based on bogus information. (Petr.Br. 33 n. 18)

As stated in Petr.Br. at 15-17, the Fourth Amendment has always provided greater protection inside the home than anywhere else. No Fourth Amendment case has ever drawn such a parallel, and this is not the place to start.[5]

C. The government's alternative blanket rule does not comport with the Fourth Amendment. It is not workable.

The United States agrees that an absolute blanket rule does not comport with the Fourth Amendment's reasonableness test. Its position is that where the police possess specific knowledge that indicates there is no exigency, an unannounced entry is not permitted. Where, however, such knowledge is lacking, the "general experience" of law enforcement in drug cases militates in favor of an unannounced entry. The government refers to this as a "workable rule" (U.S.Br. 25). It is anything but, and here is why:

1. The police have no incentive to acquire or document information which could be used to later demonstrate that they illegally entered a home.

2. Even where the police possess such information, is the officer who has it required to communicate it to the home invasion team executing the warrant? If such a duty exists, and it is breached, what is the remedy?

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[5] The position advocated by the Respondent prevents citizens from obtaining judicial review of government's choice regarding the manner in which homes are entered. Because the home, unlike the roadside, is entitled the greatest amount of Fourth Amendment protection there is no justification for abandoning an aggrieved citizen's right to such review.

3. It is unclear what level of knowledge is required before the police are required to knock and announce. It is reasonable suspicion, probable cause, or some other standard?

4. Often search warrant information is developed through the use of a confidential informant. There may be no ability for the defense to learn the identity of such an informant, and all the information he possesses, because of the informer identity privilege. See, e.g., § 905.10, Wis. Stats.; Unif.R.Evid. 509.

5. The government's position does not clarify whether there is a requirement that the police acquire information regarding the need for announcement – assuming such information is available. If there is a duty, what is the remedy if it is breached?

6. Who has the burden of going forward and burden of proof at a suppression hearing when lack of announcement during execution of a warrant is at issue?

D. The law enforcement community is not in agreement that a blanket rule is appropriate or necessary.

Amicus Attorney General of Ohio, speaking for the attorneys general of 26 states, Guam, and Puerto Rico has, like the United States, opposed an absolute blanket rule. The attorneys general state (Ohio Br. 14):

> The harder question is whether the proper result here – noncompliance with the announcement rule – invariably applies when police officers execute felony drug search warrants. The answer is an unqualified no. Normally the generalized peril to officers conducting such

> searches together with the risk of destruction of evidence will give them discretion to abandon the niceties of knocking and announcing their presence. But, because easily imagined situations exist in which objective evidence will substantially (if not entirely) diminish these dangers, it is not appropriate to establish a categorical no-knock rule.

Even more significant, we submit, are the states that joined Ohio in its brief. The Attorney General of Maryland who advocated for a blanket rule in *Maryland v. Wilson* joined in Ohio's opposition to a blanket rule involving no-knock execution of search warrants of the home. The Attorney General of Arkansas, who wanted a blanket rule two years ago in *Wilson v. Arkansas*, now has decided against asking for one. It should also be noted that Nebraska, which has had a blanket rule for many years; *see State v. Meyer*, 311 N.W.2d 520, 522 (Neb.1981); now opposes such a rule.

Although the Attorneys General of 26 states and the Solicitor General acknowledged that the execution of search warrants in drug cases poses some threat to the safety of law enforcement officers and citizens, citing statistics (Ohio Br. 10-12; U.S.Br. 15-17), they do not make the quantum leap to the blanket rule that the Respondent does.

There are many examples of situations where the need to knock and announce will always be present. For example: a residence where only children are known to be home; a home not occupied by anyone suspected of drug trafficking because the suspected drug dealer is

already incarcerated[6]; a search warrant executed at the home of an innocent third party where a dealer has stashed drugs; an undercover officer with a hidden microphone on the premises to be searched and no known risk of destruction of property or danger to officers; a successful ruse which has gotten the dealer outside (as was attempted here); or a controlled delivery by Federal Express, U.P.S., or the post office delivered by subterfuge to an unsuspecting home owner.

Chief Justice Abrahamson of the Wisconsin Supreme Court below in *State v. Richards*, 201 Wis. 2d 839, 870, 549 N.W.2d 218, 231 (1996), concurring in the result but opposing a blanket rule, said "while the death or injury of even one law enforcement officer is one too many, the empirical evidence cited does not support the majority's rationale that executing search warrants in drug cases is more dangerous to officers than other activities." The Ohio Attorney General pointed out that there are no statistics related to the number of injuries to officers in execution of warrants, not to mention in drug cases. (Ohio Br. 10) The Department of Justice in its Uniform Crime Reports apparently does not consider the subject statistically significant enough to have a separate category. While in *Maryland v. Wilson*, the number of assaults on officers making traffic stops was empirical evidence of threats to officer safety, many of the newspaper articles

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[6] *See, e.g., Larson v. Wisconsin*, 203 Wis.2d 270, 551 N.W.2d 870 (Ct.App.1996) (table; unpublished), *review denied*, 205 Wis.2d 135, 555 N.W.2d 815 (1996) (table), *pet. for cert. pending* No. 96-7167 (police entered without announcing and the incarcerated defendant's family was there).

cited by the Respondent are ten years old or more. (Resp.Br. 14)[7]

Moreover, the Department of Justice's own *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* (UCR) from 1981 to 1994 suggest probably only seven officer deaths occurring during drug raids where an announcement was clearly reported. (Petr.Br. App. B) This is not to minimize the risk to the police in executing search warrants for drugs. However, under existing procedures, accommodating Fourth Amendment interests, even after the assertedly necessary "dynamic entry," the peril is not from unannounced entry, but from officers being shot by assailants hiding in other rooms in the residence after the entry, presumably after the occupants have heard the shouting of the police officers pointing guns at their heads of others while they are on the floor face down being handcuffed (but maybe not). There is no way of knowing from the UCR summaries whether the shooters knew that the intruders were police in spite of alleged announcement.

E. The safety of both police and citizens is enhanced by the knock and announce rule.

All knock and announce cases recognize that officer safety is enhanced by announcement because it gives the target of the search notice that they are not just armed intruders committing an unlawful entry. *Sabbath v. United States*, 391 U.S. 585, 589 (1968); *Ker v. California*, 374 U.S. 23, 57-59 n. 12 (1963) (concurring opinion); *Miller v. United States*, 357 U.S. 301, 310-11 (1958); *McDonald v.*

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[7] As were the secondary authorities relied on below. (Petr.Br. 26)

United States, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring). To extrapolate on this point, a citizen's resistance to an armed police officer puts the citizen at risk, too. One who dares shoot a police officer, accidently or on purpose, while twenty more are behind him will almost surely die (as noted in the UCR summaries), but not always.[8]

Citizen safety was at issue in determining the reasonableness of police use of force in *Tennessee v. Garner*, 471 U.S. 1 (1985) (holding that a fleeing non-violent felon cannot be shot to arrest him), and *Brower v. County of Inyo*, 489 U.S. 593, 598-99 (1989) (manner of setting up roadblock to stop a car was unreasonable).

And what about informant lies that cause searches to occur? *See* Susan Watson, "A Little Stress Would Be Too Much," *Detroit Free Press*, January 16, 1989, 3A (a 2:10 a.m. raid of the wrong house, based on informant's lie, resulted in a man being shot to death in his own bed – the police fired 183 rounds).

Therefore, the safety of *all* concerned should be a part of the reasonableness calculus, not just officer safety.

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[8] At least two post-*Wilson v. Arkansas* criminal appeals are pending which involve citizens convicted of murder of police officers who claim they were merely defending themselves from intruders who failed to properly identify themselves as police. *State v. Stephen Shively*, Kansas Supreme Court No. 96-77100 (docketed July 6, 1996); *State v. Willie Green*, Arkansas Supreme Court No. CR97-59 (docketed January 18, 1997).

Mincey v. Arizona, 437 U.S. 385 (1978), *rev'g on other grounds*, 115 Ariz. 472, 566 P.2d 273 (1977), involved a defendant who shot a police officer during a raid claiming that he did not know that the persons with guns were the police.

F. The horror stories which flow from failure to knock and announce show that the Fourth Amendment's reasonableness requirement does not allow a blanket rule.

The risks to householders, the people explicitly protected by the Fourth Amendment, are increased when an unannounced entry occurs. *See Orosco v. County of Yolo*, 814 F.Supp. 885, 889 (E.D.Cal.1983) (early morning no-knock drug raid in Madison, CA resulted in a mentally-ill family member being shot and killed when the police tried to push open the door of a back bedroom; no drugs were recovered); Thomas Haynes, "Federal Judges Trying To Change The Color Of Juries," *Seattle Times*, Feb. 12, 1996, A1 (during an unannounced raid, Seattle police shot a black householder who was holding a TV remote control which the police thought was a gun; no drugs were recovered; an all-white jury awarded no damages to his family in the subsequent wrongful death suit); *Lavoie v. Hudson*, 740 F.Supp. 88 (D.N.H. 1990) (the search warrant affidavit contained intentional and reckless material misrepresentations; as the police entered unannounced, the unarmed homeowner was shot to death in his son's bedroom in the son's presence).

Even some of the Respondent's horror stories support our conclusion.[9]

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[9] The Respondent has its own list of misfortunes that arise, from the law enforcement perspective, when drug search warrants are executed. This information is not the entire story. The rest of the story is: David A. Sylvester, "Fatal Shootout, Fire in Drug Raid, San Jose Officer Seriously Injured in 1-Hour Gunbattle," *San Francisco Chronicle*, March 20, 1991 (stun grenades used after door kicked in, woman and a 3 year old girl

II. THIS IS NOT A CASE FOR ADDRESSING INEVITABLE DISCOVERY.

The respondent injects into the case whether the exclusionary rule should even be applied. (Resp.Br. 41-45). There was no cross-petition raising this issue.

In *Wilson v. Arkansas, supra,* at 1919 n. 4, this Court declined to reach this same issue even though it was sought by respondent and *amici.* This court excluded evidence for violation of the knock and announce requirement and 18 U.S.C. § 3109 in *Miller v. United States,* 357 U.S. 301, 313-14 (1958), and *Sabbath v. United States,* 391 U.S. 585, 586 (1968).

Although it does not say so, Respondent's position would require this Court to effectively overrule *Miller* and *Sabbath* and say that a violation of the Fourth Amendment right of announcement, a rule with a seven century common law lineage, is of no consequence in a criminal case.

Respondent's argument overlooks one immutable constitutional fact: If the inevitable discovery rule is applied to the rule of announcement, the rule ceases to exist. If suppression cannot be a remedy for a failure to

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dashed out of the house after gunfire, house burned to ground killing one of occupants); Pierre Thomas, "One Killed, Four Wounded in Va. Drug Raid," *The Washington Post,* January 11, 1990, at D1 (18 year old and two juveniles injured); Phillip Wattley & Henry Wood, "Vest Saves Officer In Drug Raid," *Chicago Tribune,* November 1, 1986 (officer, after running into living room, shot by man hiding behind couch); Ray Perez, "Suspect Killed Officer Wounded In Shoot-Out," *Los Angeles Times,* March 22, 1985 (woman and small girl came out of house after suspected drug dealer killed). (Resp.Br. 13-14)

knock and announce, what motive would the police have to comply with the law? Existing civil remedies are no deterrent. Even self-interest in not getting shot is not a deterrent. *See* two recent cases cited in note 8, *supra*.

Respondent's inevitable discovery exception to the exclusionary rule, indeed its whole argument, ignores the rights of innocent persons inside. Whether they live there or are guests (*Minnesota v. Olson*, 495 U.S. 91 (1990)), they have a recognizable constitutionally protected interest in the premises, "for the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967).

Innumerable knock-and-announce cases have been reported which mention innocent third-parties on the premises who either live with the suspected offender or just happen to be there at the time of the search. In this Court, we need go no further than *Wilson v. Arkansas* (friends were visiting at the time of the search; *id.*, Petr.Br. at 18-19) and *Sabbath*, 391 U.S. at 587 (unknown woman answered door who apparently was not arrested). There are cases where there are visitors engaged in intimate (including sexual) activities with the suspect; *see, e.g., Hall v. Shipley, supra;* or the suspect's wife and children who are suspected of nothing. *See, e.g., Lavoie v. Town of Hudson, supra; Sledd v. Lindsay*, 102 F.3d 282, 286 (7th Cir. 1996) (babysitter also present during raid); *United States v. Ramirez, supra* (defendant's family was in bed at time of early morning raid; defendant thought they were being robbed and fired gun into ceiling).

Of no small consequence are the rights of innocent people who are the victim of no-knock searches who die, not from gunfire, but because of a heart attack from the

emotional and physical distress from the "dynamic entry" and threats of the police. *See* note 4, *supra*.

The threat of criminal prosecution or civil actions do not deter violations of the knock-and-announce requirement. Respondent tells us that police will not be deterred by exclusion of evidence and such exclusion serves no purpose because the police are not exploiting any illegality. They want it both ways, and they want that to end the inquiry. By their own admission, they are exploiting a lack of announcement to get the sought-after evidence. All agree that the destruction of evidence exception is there to enable the police to find the evidence.[10] That is one of the rationales of the court below urged by the Respondent. So, by intentionally failing to announce, the police are, in fact, intentionally exploiting that illegality for the very purpose of catching the offender in possession of drugs.

Moreover, if the door is opened to an inevitable discovery analysis, then this Court will have to re-examine its rulings in at least one other area of the Fourth Amendment where evidence is now excluded, but would probably be inevitably discovered in the course of normal events.

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[10] As an aside, the United States notes that many offenders throw drugs out the window in an effort to destroy the drugs. (U.S.Br. at 19-20 n. 9) This proves too much. In each of those cases, the accused abandoned the drugs by leaving them for the police who recovered them and charged the accused with their possession. Thus, the drugs were hardly destroyed; the suspects were just distancing themselves from the drugs and essentially threw them into the hands of the police.

This Court has held that the search incident to arrest exception to the warrant requirement exists to ensure officer safety and preserve evidence. *Chimel v. California*, 395 U.S. 752, 755-56 (1969); *United States v. Robinson*, 414 U.S. 218, 234-35 (1973). *See also Terry v. Ohio*, 392 U.S. 1, 23-24 (1968) (stop and frisk for weapons). However, such a search is justified not by probable cause to arrest, but by the arrest itself. *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). Therefore, where the search precedes the arrest the fruits of such a search may be inadmissible (especially where the arrest is based on the search). *See, e.g., State v. Swanson*, 164 Wis.2d 437, 450-53, 475 N.W.2d 148, 154-55 (1991). This is true despite the fact that such evidence would have been inevitably discovered once the officer exercised his or her option to arrest the suspect.

III. THE RESPONDENT'S USELESS GESTURE CLAIM CANNOT BE FAIRLY DETERMINED ON THIS RECORD.

When Steiney Richards opened the still-chained door an inch or an inch and one half, his field of vision permitted him to see a person dressed in a Ramada Inn maintenance man's shirt and an officer in full *military*[11] uniform (JA 38-39, 43). The record hardly shows unequivocally that, in Richards' line of sight, there was any

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[11] It is common for some officers performing drug raids to wear military clothing such as "army fatigue type clothes" without badges or other visible police identification. *See, e.g., United States v. Steward*, 867 F.2d 581, 584 (10th Cir.1989).

person easily recognizable as a police officer.[12] Whether knock-and-announcement was or would have been a useless gesture cannot be fairly determined on this record. A remand will be required to determine this issue. For useless gesture to apply, the officers must be "virtually certain" that the suspect is aware of their purpose; *Miller v. United States*, 357 U.S. 301, 310 (1958); and this they cannot show.

The Wisconsin Supreme Court found as a dispositive fact, for purposes of the appeal, that the police did not knock-and-announce prior to entry. *State v. Richards*, 201 Wis.2d 829, 843, 549 N.W.2d 218, 220 (1996). Respondent, on the other hand, claims that after a wait of two to three seconds, officers announced "police officers" and began to break down the door. (JA 39-41) Whether Petitioner heard them is also disputed. The facts as claimed by Respondent do not suggest that the police believed knock-and-announcement to have been a useless gesture under the circumstances. The Wisconsin court's approach to the issue obviated findings of fact, just like it obviates the officer's need to find facts.

The Respondent mentions the argument that making announcement would have given Petitioner the opportunity to flee. (Resp.Br. 21) this ignores the fact that this was a ground-floor motel room with officers waiting outside the window. When Petitioner jumped out the window at 3:40 a.m., it was into the arms of waiting officers. (JA 47)

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[12] Respondent does not admit this in its brief when it talks about what petitioner should have understood was happening that early morning.

IV. THE BROAD VIEW.

What is the potential cost of Respondent's position in constitutional and human terms?

In constitutional terms, the sanctity of the home will have been subordinated to this overwhelming need of Respondent to get drugs off the street. The "war on drugs," however, should not degenerate into a war on individual liberty. When common law and the Fourth Amendment rule of announcement can be classified as mere ceremony that can cost law enforcement officers their lives, individual liberty suffers.

In human terms, Respondent's fear of police shootings, however, never even considers the equally weighty risk that citizens will get shot, too. We agree that losing just one police officer's life is one too many; we just want the Court to recognize that losing one innocent citizen's life is one too many, too.

Dispensing with announcement will cost lives when homeowners defend themselves from the heavily-armed unknown intruders. Gunfire will erupt, bullets will fly, and there is nothing we can do to stop it. All we can do is pray that police officers will make the proper decision to announce or not before they go in based on the facts known to them at the time and not simply based on the class of crime involved. When they stand there at the threshold, they should pause and think and balance the facts they have with the need for announcement. Their lives and the lives of those inside could well depend on it.

Drugs have severely harmed our national fabric, but not just in the lives wasted from ingesting them or prison

sentences meted out. Drugs should not become a thumb on the scales of justice that exalts law enforcement interests over individual liberty and takes balancing out of the constitutional equation. That is just what this blanket rule does, and that is why it must be rejected.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed and remanded.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

STEINEY J. RICHARDS, PETITIONER

v.

STATE OF WISCONSIN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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38 pp

QUESTION PRESENTED

Whether it is reasonable for police officers who have a warrant to search a dwelling for evidence of drug trafficking to enter the dwelling to execute the warrant without a prior announcement of their presence and purpose.

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In the Supreme Court of the United States

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v.

STATE OF WISCONSIN

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TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether it is reasonable for the police to enter a dwelling without a prior announcement of their presence and purpose when executing a valid search warrant for evidence of drug trafficking. Because the Court's analysis and resolution of that question is likely to affect the admissibility of evidence offered in federal criminal prosecutions, the United States has an interest in this case.

STATEMENT

1. During the week of December 22, 1991, an informant advised Detective Richard Pharo of the Madison, Wisconsin, Police Department that at least four black males from the Detroit area were trafficking in drugs at the "Motel 6" in Madison, where they were registered as guests. J.A. 3-5. Investigating that lead, Detective Pharo found that four black males were at the motel and that they had frequently

refused maid service, had paid in cash for the rooms, and had made and received numerous telephone calls. J.A. 5.

Detective Pharo learned that one of the four men had registered under petitioner's name and had given his address as 11415 Sorrello, Detroit, Michigan. J.A. 6. He also learned that petitioner had been previously arrested while in possession of 63 packets of cocaine. *Ibid.* On December 28, the four men checked out of the Motel 6. The same day, petitioner checked into a Ramada Inn under his own name, paying in cash for the room through January 4, 1992. J.A. 7.

Based on the above information, the Madison Police obtained a warrant to search Room 138 of the Ramada Inn for evidence of drug trafficking. J.A. 8-10. The state court judge issuing the warrant, however, declined to authorize an unannounced entry. J.A. 9, 42.

The police executed the warrant at 3:40 a.m. on December 31, 1991. J.A. 18, 25, 37-38. Detective Pharo, wearing a Ramada Inn shirt, attempted to gain entry to Room 138 by ruse. J.A. 27. Three police officers, one of whom was in uniform, stood to the right of Detective Pharo; two officers in plain clothes stood to his left. Three other officers stationed themselves in a room directly across the hall from Room 138. J.A. 39.

Detective Pharo knocked on the door of Room 138 and, when someone inside the room asked who it was, stated that he was a maintenance man. J.A. 27, 39-40, 42. Petitioner opened the door about one and one-half inches, looked at Detective Pharo, and then looked over Pharo's shoulder towards the police officer in full uniform who was standing three to four feet to the right of Pharo; petitioner's face registered surprise. J.A. 38, 41. Petitioner slammed the door. J.A. 39. Detective Pharo, yelling "police officer," grabbed the doorknob and unsuccessfully attempted to swing the door open; as he did so, he heard the door being bolted. J.A. 39, 41, 44. Detective Pharo heard

another officer yell "police officer," and possibly heard someone yell it again after that. J.A. 40, 44. Detective Pharo and another officer kicked the door, but the door did not move. J.A. 39, 44-45. When there was no response from anyone inside the room, Officer Peregoy came from the room across the hall and forced the door open with his shoulder. J.A. 39, 44-45, 66. As the door opened, Detective Pharo heard the sound of glass breaking. J.A. 39.

Officers entered the room just as petitioner was jumping through a closed window into the courtyard of the Ramada Inn. J.A. 19-20. Another individual, Jerel Dates, was present in the room. J.A. 28. The officers found two plastic bags hidden above a ceiling tile in the bathroom. J.A. 20, 30. One bag contained approximately $3,000 cash; the other bag contained two socks inside which were hidden several baggies. Some of the baggies contained large chunks of cocaine base; others contained over 100 zip-loc gem packs containing cocaine base. J.A. 11-12, 20-21. Officers also found a box of sandwich baggies on a nightstand between the two beds, and papers containing names, telephone numbers, and numeric notations, which appeared to be drug balance sheets. J.A. 11, 22, 31.

2. An information was brought against petitioner by the State of Wisconsin, charging him with possession of cocaine base with intent to deliver it, in violation of Wis. Stat. Ann. § 161.41(1m) (West 1989); and with a violation of Wisconsin's tax stamp statute. Wis. Stat. Ann. § 139.95(2) (West 1989). J.A. 13-17. Petitioner moved to suppress the evidence seized from his hotel room on the ground, *inter alia*, that the officers executing the warrant failed to identify themselves and their purpose before entering and failed to allow him time to open the door. J.A. 35-36.

At the preliminary hearing and, later, at the hearing conducted on the motion to suppress, the officers executing the warrant testified to the facts described above. J.A. 18-32, 37-45, 64-69. Petitioner disputed the officers' testi-

mony. He testified that in the early morning hours of December 31, 1991, someone knocked at the door of his motel room and, in response to petitioner's inquiry, identified himself as the maintenance man. J.A. 45-46. Petitioner claimed that as he opened the door, Detective Pharo, who was wearing a Ramada Inn shirt, hit the door, trying to push it in. In response, petitioner said he slammed the door shut. J.A. 46. Petitioner further testified that when he looked out the door, he had not seen any uniformed police officers. J.A. 47. Petitioner denied that the police had announced their identity and purpose before entering the room; according to him, the officers announced their identity only after entering the room, by which time he was jumping out the window. J.A. 47-48.

The trial court denied the motion to suppress. J.A. 55-56. The court credited the testimony of the officers and discredited the testimony of petitioner, finding it to be self-serving and lacking in credibility. In particular, the court found that the officers had announced their presence before entry. J.A. 54-55. The court further found that, although the officers' announcement of their presence and the forced entry were "close to each other," the officers had allowed petitioner some opportunity to open the door before entering the room. J.A. 55. The court observed that, given the easy disposability of controlled substances, the officers were not required "to stand around in the hall forever." *Ibid.*

The court also inferred from the evidence that petitioner knew full well that it was the police seeking entry into the room. The court explained that petitioner's action in "bail[ing] out the window while all of this is going on would lead someone of a suspicious nature to believe that maybe he did not want Detective Pharo, the maintenance man, to come in because he was aware that accompanying Detective Pharo, even if he was the maintenance man, was a uniformed police officer." J.A. 54.

Following the denial of his motion to suppress, petitioner pleaded no contest to the charges against him. He was sentenced to 13 years' imprisonment on the drug count and to three years on the tax count. J.A. 70-71.

3. The Court of Appeals of Wisconsin affirmed. J.A. 73-75. It relied on *State* v. *Stevens*, 511 N.W.2d 591 (Wis. 1994), cert. denied, 115 S. Ct. 2245 (1995), in which the Wisconsin Supreme Court held that police officers executing a search warrant may always dispense with a knock and prior announcement of their presence when the warrant allows them to search for evidence of felony drug offenses.

4. The Wisconsin Supreme Court affirmed the trial court's denial of petitioner's motion to suppress, concluding that the rule it announced in *Stevens* remained valid under this Court's decision in *Wilson* v. *Arkansas*, 115 S. Ct. 1914 (1995). J.A. 76-97.[1] The court explained that police may dispense with a prior announcement when they have "exigent circumstances," which it stated include a reasonable belief that announcement of the police presence would endanger the officers or result in the destruction of evidence. J.A. 81. The court concluded that those two factors are present in every case in which police officers execute a warrant to search for evidence of felony drug distribution violations. J.A. 81-82. According to the court, "[t]he very facts supporting probable cause to believe that drugs and drug dealers are present in a dwelling also lead to the reasonable belief that exigent circumstances exist." J.A. 84.

The Wisconsin Supreme Court noted that this Court in *Wilson* had expressly acknowledged that the Fourth

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[1] Although the trial court had found that the police announced their presence before entering, the Wisconsin Supreme Court stated without further comment that the police officers "did not knock and announce prior to their entry." J.A. 78. We analyze the case on the same basis as did the Wisconsin Supreme Court.

Amendment announcement principle must yield to "countervailing law enforcement interests," 115 S. Ct. at 1918-1919, including the need to protect the officers' safety and to prevent the destruction of evidence. J.A. 85-86. The court found no evidence that this Court in *Wilson* intended to forbid a blanket recognition of those interests in a category of cases. J.A. 85.

Justice Abrahamson concurred in the judgment. J.A. 97-109. She found sufficient facts in this case to justify an unannounced and forced entry, but argued that the court erred in reaffirming a blanket rule allowing police to dispense with the announcement requirement in all felony drug cases. J.A. 99-109.

SUMMARY OF ARGUMENT

This Court's decision in *Wilson* v. *Arkansas*, 115 S. Ct. 1914 (1995), established that it may be unreasonable under the Fourth Amendment for officers executing a search warrant not to knock and announce their purpose and authority before entering a dwelling. The Court's decision in *Wilson* also established that officers may dispense with a pre-entry knock and announcement when an immediate entry is justified by the need (among other things) to protect officer safety or to prevent the destruction of evidence. Based on its understanding of those principles, the Supreme Court of Wisconsin held that the execution of a search warrant for evidence of drug trafficking *always* presents a sufficient risk of violence or destruction of evidence to justify immediate entry without a knock or announcement. Petitioner asserts, in contrast, that the reasonableness of an immediate entry turns on whether the executing officers have particularized knowledge that the individuals in the dwelling pose a specific risk of violence or destruction of evidence.

In our view, neither of those two approaches is correct. We submit that a police officer is ordinarily justified in

believing, based on the fact that he has a warrant to search for evidence of drug trafficking, that advance notice to the occupants of the dwelling would create a significant risk of violence or destruction of evidence. The reasonableness of that belief is based on the experience of the police and courts in a myriad of drug trafficking cases, in which the close association between powerful firearms and violence, on the one hand, and drug trafficking, on the other, has been exhaustively detailed. It is also based on the equally consistent experience of the police and courts with drug traffickers, who can be expected to attempt to get rid of their easily disposable wares if given a short grace period before the police enter with a search warrant. Accordingly, because execution of a drug trafficking search warrant carries a significant risk of violence and potential for destruction of evidence, it is ordinarily reasonable for police officers to dispense with a pre-entry knock and announcement. Where, however, police officers know sufficient facts to make the ordinary inferences of dangerousness and destruction of evidence *un*reasonable in a given case, they may not rely on those risks to justify an unannounced entry.

Petitioner suggests that officers must have case-specific information about a particular risk of violence or likely destruction of evidence before they may make an unannounced entry. That suggestion vastly overstates the degree of certainty needed to justify police action under the Fourth Amendment's general requirement of reasonableness. In most cases, the executing agent's knowledge that the case involves a search for evidence of drug trafficking itself justifies a case-specific belief that an announcement before entry will create a risk of danger or destruction of evidence. No more is necessary to satisfy the requirement of reasonableness that governs the Fourth Amendment inquiry. The heightened showing of specificity proposed by petitioner not only is unrealistic,

but it would deprive officers of the benefit of inferences drawn from a vast body of experience with the risks in executing drug trafficking search warrants.

In this case, the police officers had ample reason to infer a significant risk of violence or destruction of evidence if they provided a grace period to petitioner before entry into his motel room. There is nothing in the record in this case to suggest that those inferences were incorrect or to make them unreasonable under the circumstances of this case. Accordingly, entry into petitioner's motel room without a prior knock and announcement was reasonable under the Fourth Amendment.

ARGUMENT

THE IMMEDIATE ENTRY OF PETITIONER'S MOTEL ROOM TO EXECUTE A VALID NARCOTICS SEARCH WARRANT WAS REASONABLE

A. Although The Common Law Rule Of Announcement Is An Aspect Of The Fourth Amendment's Reasonableness Requirement, An Unannounced Entry May Be Valid If It Is Supported By Sufficient Justification

The common law generally required that officers, before entering a person's dwelling, knock on the door and announce their identity and purpose. *Wilson* v. *Arkansas*, 115 S. Ct. 1914, 1916-1918 (1995); *Miller* v. *United States*, 357 U.S. 301, 313 (1958). The common law also required that officers not enter a home forcibly until their request to enter had been actually or constructively refused. 2 W. LaFave, *Search and Seizure* § 4.8(c), at 606-610 (3d ed. 1996); *Miller*, 357 U.S. at 308. Most States have enacted variants of the common law rule. See *Wilson*, 115 S. Ct. at 1917; *Miller*, 357 U.S. at 308. Congress has also embodied that rule in the federal knock-and-announce statute, enacted in 1917 and codified today at 18 U.S.C. 3109. That statute permits a federal officer to enter a home forcibly if,

after giving "notice of his authority and purpose," he is "refused admittance."[2]

In *Wilson* v. *Arkansas*, this Court held that the common law knock-and-announce principle forms "an element of the reasonableness inquiry under the Fourth Amendment" and that "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." 115 S. Ct. at 1918. At the same time, the Court emphasized that the Fourth Amendment's "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Ibid.* Although the Court declined to "attempt a comprehensive catalog," *id.* at 1919, of all of the factors that could outweigh "the presumption in favor of announcement," *id.* at 1918, the Court noted, by way of example, that an unannounced entry may be justified "under circumstances presenting a threat of physical violence"; "where a prisoner escapes * * * and retreats to his dwelling"; and "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." *Id.* at 1918-1919.

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[2] Section 3109 provides: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." Although the statute refers only to search warrants, its criteria apply as well to the execution of arrest warrants. *Sabbath* v. *United States*, 391 U.S. 585, 588-589 (1968); *Miller*, 357 U.S. at 306; *Wong Sun* v. *United States*, 371 U.S. 471, 482-484 (1963).

B. Protecting The Safety Of Police Officers And Preventing The Destruction Of Evidence Are Sufficient Justifications For An Unannounced Entry

1. There is no serious dispute between the parties in this case that there are circumstances in which the first and the third of the justifications mentioned by the Court in *Wilson*—protecting against violence and preventing the destruction of evidence—make it reasonable for police officers to enter a dwelling without a pre-entry knock or announcement.[3]

Petitioner does not dispute that the need to protect officer safety and to preserve evidence can provide justifications for dispensing with a pre-entry knock or announcement, as this Court stated in *Wilson*. To the contrary, petitioner concedes that where officers can "point to specific and articulable facts which justify their entering without announcement under any of the recognized exceptions to knock-and-announce," they may constitutionally make an unannounced entry. Pet. Br. 44-45.

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[3] The issue in this case concerns the circumstances in which the police may dispense with a *pre-entry* knock, announcement, and brief pause while the occupants of the dwelling are given the opportunity to open the door. Even in cases in which police may enter immediately, it may be reasonable for them to announce their identity and purpose simultaneously with entry. Federal agents, for example, virtually always announce their presence when executing a search warrant by demanding entry with language such as "FBI—we have a warrant to search your apartment—open the door." Even when officers do not believe that they can afford to delay the entry, an announcement simultaneous with entry alerts the occupants to the presence of federal officials, and thereby reduces the risk that the agents will be mistaken for intruders. The FBI's policy in applying Section 3109, however, states that "[w]here the Agent executing the warrant reasonably believes that by the announcement he/she will place himself/herself or other persons within [the] premises in imminent peril of bodily harm," entry may be accomplished without announcement. See *FBI Legal Handbook for Special Agents* §§ 5-2.2.2, 5-2.2.3(1) (1994).

The substance of petitioner's argument is that this determination must be made on a case-by-case basis. See also ACLU, et al., Amicus Br. 21-29.

The Supreme Court of Wisconsin similarly recognized that "an extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants" may justify an entry without a prior knock and announcement. J.A. 76-77. The court disagreed with petitioner's view, however, that those factors must be evaluated with a high degree of specificity in each case. The court instead held that those "exigent circumstances are always present in the execution of search warrants involving felonious drug delivery," J.A. 76, and that a blanket exception to the knock-and-announce rule in such cases was therefore warranted.

2. Because the question whether officers executing a warrant may dispense with a prior knock and announcement is "an element of the reasonableness inquiry under the Fourth Amendment," *Wilson*, 115 S. Ct. at 1918, it must be resolved by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985) (quoting *United States* v. *Place*, 462 U.S. 696, 703 (1983)); *Maryland* v. *Buie*, 494 U.S. 325, 331 (1990); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). The result of that balancing, in our view, is a rejection of both the Wisconsin Supreme Court's determination that law enforcement interests are "always" paramount in this situation and petitioner's position that the evidence must be assessed in each case to determine whether the officers executing the warrant had knowledge particular to that case that would justify dispensing with a pre-entry announcement. Rather, in our view, the possession of a narcotics search warrant is ordinarily sufficient to make it reasonable for officers to enter without a knock and

prior announcement. But there may be cases where that is not so, and in such cases, an unannounced entry would be unreasonable.

C. Officer Safety Generally Provides A Basis For An Unannounced Entry In Drug Trafficking Cases

1. This Court has frequently noted the "weighty interest in officer safety," *Maryland* v. *Wilson*, No. 95-1268 (Feb. 19, 1997), slip op. 4, and has held that that interest is sufficient to render reasonable many police intrusions on Fourth Amendment interests. Even when there is less than absolute assurance that a particular situation would threaten officers' safety, this Court has recognized that the powerful interest in officer security makes it reasonable for officers to take protective actions.

For example, in *Maryland* v. *Wilson*, the Court held that the "legitimate and weighty" interest in officer safety, slip op. 3, was sufficient to justify police officers in requiring passengers to get out of a car that has been stopped for a traffic violation. The Court did not require absolute certainty that there would be a threat to officer safety in each instance; instead, the Court relied on the fact that "traffic stops *may* be dangerous encounters," *id.* at 4 (emphasis added), and that the "danger to an officer from a traffic stop *is likely to be greater* when there are passengers in addition to the driver in the stopped car," *id.* at 6 (emphasis added). The Court has similarly noted in a variety of other contexts that a threat—though not necessarily a certainty—of danger to police officers may justify Fourth Amendment intrusions. See *Buie*, 494 U.S. at 336 ("protective sweep" of house justifiable based on "reasonable suspicion of danger"); *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) ("protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger"); *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981) ("interest in mini-

mizing the risk of harm to the officers" justifies detaining occupant of premises while search is conducted); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (relying on the "inordinate risk confronting an officer" to justify requirement that driver exit car in a traffic stop); *United States* v. *Robinson*, 414 U.S. 218 (1973) (search of arrestee for weapons permissible, regardless of whether there is reason to believe arrestee is armed or dangerous); *Chimel* v. *California*, 395 U.S. 752, 763 (1969) (search incident to arrest justified on ground that without search "officer's safety might well be endangered"). As the Court stated in *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968), "[c]ertainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."

2. An officer who prepares to enter a dwelling of a suspected drug trafficker to execute a search warrant faces an unusually acute risk of violence. There is a significant possibility that persons inside will be armed and that the premises will have been fortified in anticipation of a police raid. See Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule—Part I*, 16 Search & Seizure L. Rep. 129, 129-130 (July 1989).[4] Indeed, the courts have frequently recognized that there is a well-established association between guns and drugs; firearms are "tools of the [narcotics] trade." *United States* v.

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[4] See also, *e.g.*, A. Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, H. John Heinz III School of Public Policy and Management, Carnegie Mellon Univ. Working Paper Series 18 (1994) ("juveniles, as all participants in the illicit drug industry, are very likely to carry guns for self-protection, largely because that industry uses guns as an important instrument for dispute resolution"); Sheley, *Drug Activity and Firearms Possession and Use By Juveniles*, 24 J. Drug Issues 363, 373 (1994) (90% of the drug dealers in the surveyed population owned a firearm and 83% of those who had sold drugs had fired a gun at someone).

Bonner, 874 F.2d 822, 824 (D.C. Cir. 1989).[5] And the guns that drug traffickers prefer are often machine guns and other heavy weaponry that pose the greatest danger to police officers and bystanders. See, *e.g.*, *United States* v. *Kirk*, No. 94-50472, 1997 WL 40602, at *9 n.1 (5th Cir. Feb. 3, 1997) (en banc) (opinion of Higginbotham, J.) (citing 29 recent federal appellate cases).

Once an officer has announced his intention to enter a home to execute a search for contraband or to make an arrest, the drug trafficker has a heightened incentive to prevent the officer from attaining those goals. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Drugs, Crime, and the Justice System: A National Report* 5 (Dec. 1992) ("To avoid being arrested and punished for trafficking, drug dealers commit violent crimes against police and threaten informants or witnesses."). Accordingly, "the

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[5] See also *United States* v. *Hromada*, 49 F.3d 685, 689 & n.8 (11th Cir. 1995) ("Guns and violence go hand-in-hand with illegal drug operations."); *United States* v. *Golter*, 880 F.2d 91, 94 (8th Cir. 1989) (noting the "well recognized nexus between drugs and firearms"); *United States* v. *Gahagan*, 865 F.2d 1490, 1499 (6th Cir.), cert. denied, 492 U.S. 918 (1989); *United States* v. *Cruz*, 805 F.2d 1464, 1474 (11th Cir. 1986) ("[G]uns are a tool of the drug trade. There is a frequent and overpowering connection between the use of firearms and narcotics traffic."), cert. denied, 481 U.S. 1006 & 482 U.S. 930 (1987); *United States* v. *Payne*, 805 F.2d 1062, 1065 (D.C. Cir. 1986) ("[S]ubstantial dealers in narcotics possess firearms and * * * such weapons are as much tools of the trade as more commonly recognized drug paraphernalia."); *United States* v. *Grant*, 545 F.2d 1309, 1313 (2d Cir. 1976) (taking judicial notice that "substantial dealers in narcotics keep firearms on their premises as tools of the trade"), cert. denied, 429 U.S. 1103 (1977); *United States* v. *Wiener*, 534 F.2d 15, 18 (2d Cir.) (noting that large scale drug dealers typically keep firearms at their base of operations as a tool of the trade), cert. denied, 429 U.S. 820 (1976); accord *United States* v. *Singer*, 943 F.2d 758, 762-763 (7th Cir. 1991); *State* v. *Stevens*, 511 N.W.2d 591, 596-597 (Wis. 1994), cert. denied, 115 S. Ct. 2245 (1995); *Commonwealth* v. *Rodriguez*, 614 N.E.2d 649, 651 (Mass. 1993); *State* v. *Stalbert*, 783 P.2d 1005, 1007 (Or. Ct. App. 1989).

law has uniformly recognized that substantial dealers in narcotics possess firearms" and that "entrance into a situs of drug trafficking activity carries all too real dangers to law enforcement officers." *United States* v. *Kennedy*, 32 F.3d 876, 882-883 (4th Cir. 1994) (internal quotation marks omitted; citing cases), cert. denied, 115 S. Ct. 939 (1995).

Because drug dealers are so heavily armed and are so frequently willing to use their weapons to protect their illegal operations, this Court has recognized the risks of executing search warrants in narcotics trafficking cases. As the Court explained in *Michigan* v. *Summers*, 452 U.S. at 702-703 (footnote omitted): "[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." See also *Harmelin* v. *Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part and concurring in judgment) ("Studies * * * demonstrate a direct nexus between illegal drugs and crimes of violence.") (citing Goldstein, *Drugs and Violent Crime, in Pathways to Criminal Violence* 16-48 (N. Weiner & M. Wolfgang eds. 1989)); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 669 (1989).

3. In light of those risks of violence, a police officer may reasonably take steps, such as dispensing with pre-entry announcement or delay following announcement, to protect himself and lessen the overall risk of violence while executing a search warrant for evidence of drug trafficking. Indeed, giving the occupants a grace period during which they may prepare a violent response to the inevitable entry can increase the overall likelihood of violence and the resulting risk of injury to officers, bystanders, and the occupants themselves. On the other side

of the scale, when the entering officers have a warrant to enter a home, the occupants' privacy interest is necessarily limited to the brief interval between the officers' announcement and their entry. Given the weighty interest in officer safety and the necessarily limited privacy interest of the occupants of the dwelling, the fact that police officers are entering the home of a suspected drug trafficker is thus ordinarily sufficient to warrant a reasonable belief that the officers will face a significant risk of violence, and therefore to justify dispensing with a pre-entry announcement.[6]

Because the Fourth Amendment standard is an objective one, see, *e.g.*, *Whren* v. *United States*, 116 S. Ct. 1769 (1996), the principle that drug traffickers are dangerous (and that they are likely to destroy evidence if given the opportunity, see pp. 18-23, *infra*) holds true whenever the police are executing a drug trafficking search warrant and

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[6] The lower courts interpreting Section 3109 have generally recognized that it is reasonable to forgo announcement (or to enter simultaneously with announcement) when a reasonable basis exists to believe that advance notice of an entry would place the officers or others in peril. See, *e.g.*, *United States* v. *Hudson*, 100 F.3d 1409, 1417 (9th Cir. 1996); *Kennedy*, 32 F.3d at 882-883 (entry immediately after announcement); *United States* v. *Streeter*, 907 F.2d 781, 788-789 (8th Cir. 1990) (entry five to ten seconds after announcement); *United States* v. *Nabors*, 901 F.2d 1351, 1354 (6th Cir.) (entry immediately after announcement), cert. denied, 498 U.S. 871 (1990); *Bonner*, 874 F.2d at 826 (entry 11-12 seconds after announcement); *United States* v. *Spinelli*, 848 F.2d 26, 30 (2d Cir. 1988) (unannounced entry); *United States* v. *Kane*, 637 F.2d 974, 978-980 (3d Cir. 1981) (unannounced entry); *United States* v. *Whitney*, 633 F.2d 902, 905, 908-911 (9th Cir. 1980) (entry "[w]ithin seconds" of announcement), cert. denied, 450 U.S. 1004 (1981); *United States* v. *Artieri*, 491 F.2d 440, 442, 444 (2d Cir.) (entry three seconds after announcement), cert. denied, 417 U.S. 949 & 419 U.S. 878 (1974); see also Restatement (Second) of Torts § 206 cmt. d, at 387 (1965); *Read* v. *Case*, 4 Conn. 166, 170 (1822) (recognizing a common law "peril to officers" exception).

do not know of facts that negate it. Therefore, no further purpose would be served by requiring officers in each case to show that the likely occupants of the dwelling pose a particularly high risk of violence, a showing that will rarely be available; the fact that the occupants are suspected drug traffickers or their accomplices is ordinarily sufficient to warrant a reasonable officer to fear a significant threat to his safety. Nor would it serve any purpose to require the government to prove that general point in each case; the broad experience of the police and courts in this area is sufficient to support the reasonableness of that generalization.

There may be particular cases, however, in which the police are aware of facts that are sufficient to negate the general principle that entering the home of a drug trafficker poses a significant risk of violence. If there are such facts in a particular case that make it *un*reasonable for an officer to fear a significant risk of violence, then an unannounced entry in that case would not be justifiable on that basis under the Fourth Amendment. If, for example, officers know that the persons suspected of drug trafficking were not present within the building at the time of the entry and they have no other reason to believe that the persons inside presented a risk of danger, an unannounced entry based on a fear of peril would be unreasonable. It would also be unreasonable to make an unannounced entry on grounds of possible peril where the officers had reliable and uncontradicted information (*i.e.*, from an informant) that the persons were unarmed. Compare *Sabbath* v. *United States*, 391 U.S. 585, 591 (1968) (exigency exception to Section 3109 inapplicable where "agents had no basis for assuming petitioner was armed or might resist arrest"). But otherwise, given the common possession of firearms by drug traffickers and the high risk of violence in police encounters with them, law enforcement officers have a reasonable basis for anticipating danger in cases involving

narcotics traffickers, and the Constitution does not prevent the officers from using the element of surprise to minimize that danger.[7]

D. Preservation Of Evidence Generally Provides A Basis For An Unannounced Entry In Drug Trafficking Cases

Analogous principles hold true for destruction of evidence. An officer entering a dwelling to execute a search warrant for evidence of drug trafficking encounters a heightened risk that the target of the search will dispose of the drugs during the time between announcement and entry. Drugs generally take up small volumes in relation to their value, and they are usually easily and quickly disposable through plumbing fixtures, windows, and other means. For that reason, there is an inherent risk that a drug dealer who hears a police knock and announcement will immediately dispose of drugs while police officers are waiting for admittance—or, more likely, refusal of admittance—into the dwelling.

In *Ker* v. *California*, 374 U.S. 23 (1963), a plurality of this Court accepted that the risk of destruction of drugs would justify an unannounced entry. The plurality explained that the unannounced entry into a drug suspect's home was reasonable because the drugs "could be quickly and easily destroyed." *Id.* at 40. The plurality adverted to an officer's testimony that, in his experience, "on 'many, many occasions' * * * '[narcotics suspects] have flushed

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[7] It would not undercut the reasonableness of the officers' belief to show that, unbeknownst to the officers in a particular case, the occupants of the dwelling were not in fact prepared to use violence. "It goes without saying that in determining the lawfulness of entry * * * we may concern ourselves only with what the officers had reason to believe *at the time of their entry*." *Ker* v. *California*, 374 U.S. 23, 40 n.12 (1963) (plurality opinion); cf. *Illinois* v. *Rodriguez*, 497 U.S. 177, 186 (1990).

narcotics down toilets, pushed them down drains and sinks and [used] many other methods of getting rid of them prior to my entrance.'" *Id.* at 28 n.3.[8]

The likelihood noted by the *Ker* plurality that a suspect will attempt hurriedly to dispose of narcotics evidence on learning that police are about to enter his dwelling is by now established beyond serious question.[9] That tendency

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[8] In *Chimel* v. *California*, similar principles underlay the Court's holding that whenever an arrest is undertaken, "it is entirely reasonable for [an] arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." 395 U.S. at 763. The Court did not require a certainty that the evidence would be destroyed in order to justify the search, nor has the Court required proof that the particular arrestee was likely to conceal or destroy evidence. Because the context of an arrest inherently creates a threat that the arrestee will conceal or destroy evidence, a search of the arrestee's person satisfies the Fourth Amendment's "reasonableness" command.

[9] See, *e.g.*, *United States* v. *Buford*, No. 96-3244, 1997 WL 73662, at *1 (8th Cir. Feb. 24, 1997) (officer executing search warrant "saw an arm come through the corner of a window screen and toss a clear plastic 'baggie' onto a truck below"); *United States* v. *Mitchell*, 64 F.3d 1105, 1111 (7th Cir. 1995) (noting defendant's "attempt to throw the briefcase [containing crack cocaine and marijuana] out of the window" before his arrest), cert. denied, 116 S. Ct. 1549 (1996); *United States* v. *Melendez*, 60 F.3d 41, 45 (2d Cir.) (officers stationed outside while arrest warrant executed saw "a loaded machine gun, a box of 'Absolute' heroin, and a drug record" thrown out of the window), cert. denied, 116 S. Ct. 258, 429 (1995), cert. granted and judgment vacated on other grounds, 116 S. Ct. 900 (1996); *United States* v. *Lindsey*, 47 F.3d 440, 443 (D.C. Cir.) (officers "recovered a plastic vial containing crack cocaine from the ground outside the apartment" which police "observed being thrown from the apartment by [defendant]"), vacated on other grounds, 116 S. Ct. 665 (1995); *United States* v. *King*, 36 F.3d 728, 732-733 (8th Cir. 1994) (officers executing search warrant observed defendant "throw[ing] drugs out of the house" and "throwing [a] gun out of the window"), cert. denied, 115 S. Ct. 954 (1995); *United States* v. *Simms*, 18 F.3d 588, 592 (8th Cir. 1994) (defendant saw police and then "threw an opened package containing cocaine base out a window");

is reflected in the numerous decisions that recount suspects flushing or pouring powdery, granular, leafy, and liquid narcotic substances down various indoor plumbing facilities as police enter or prepare to enter.[10] Thus, the

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United States v. *Rosa*, 11 F.3d 315, 326 (2d Cir. 1993) (officers waiting outside while search warrant was executed "saw plates containing a white powder believed to be heroin being thrown out the window"), cert. denied, 511 U.S. 1042 & 114 S. Ct. 1864 (1994); *United States* v. *Jackson*, 990 F.2d 251, 252 (6th Cir. 1993) (agents executing search warrant "found a bag containing * * * crack cocaine outside an apartment window"); *United States* v. *Hale*, 977 F.2d 455, 456 (8th Cir. 1992) (defendant "threw * * * cocaine and money out the window" when police arrived to execute search warrant).

[10] See, *e.g.*, *Wilson* v. *Arkansas*, 115 S. Ct. at 1916 (defendant found "in the bathroom, flushing marijuana down the toilet"); *United States* v. *Bauer*, 84 F.3d 1549, 1553 (9th Cir.) (when police searched defendant's home, "she was flushing marijuana down the toilet"), cert. denied, 117 S. Ct. 267 (1996), Nos. 96-7179, 96-7220, 96-7223, 96-7226, 96-7303 (Feb. 18, 1997); *United States* v. *Birbal*, 62 F.3d 456, 458 (2d Cir. 1995) (defendant found "flushing cocaine down a toilet as police executed a search warrant in his home"); *United States* v. *Lucien*, 61 F.3d 366, 375 (5th Cir. 1995) (defendant "was flushing [cocaine base] down the toilet when the police arrived"); *Wigglesworth* v. *Oregon*, 49 F.3d 578, 579-580 (9th Cir. 1995) (lab report showed "presence of cocaine in water [defendant] was flushing down a sink drain when she was arrested"); *United States* v. *McMillon*, 14 F.3d 948, 954 (4th Cir. 1994) (police "encountered [defendant] flushing some items down the toilet," which defendant stated "were cocaine"); *United States* v. *Johnson*, 12 F.3d 827, 830 (8th Cir.) (defendant "found flushing crack cocaine and methamphetamine down a toilet" when police arrived to execute search warrant), cert. denied, 511 U.S. 1095 (1994); *United States* v. *Kenyon*, 7 F.3d 783, 784 (8th Cir. 1993) (before officers could enter dwelling to execute search warrant, defendant "disposed of an estimated nine ounces (255 grams) of cocaine by flushing it down a toilet"); *United States* v. *Carr*, 939 F.2d 1442, 1447 (10th Cir. 1991) (officer apprehended defendant "in the bathroom pouring a bottle of PCP into the toilet"); *United States* v. *Roberts*, 913 F.2d 211, 219 (5th Cir. 1990) (officer "recovered numerous small baggies of cocaine found flushing in the toilet" of dealer's dwelling), cert. denied, 500 U.S. 955 (1991); *United States* v. *Baker*, 907 F.2d 53, 54 (8th Cir. 1990) (officer executing

actual experience in narcotics cases confirms what common sense would suggest: "[I]t is a common practice for drug dealers to attempt to destroy the drug evidence when they are alerted to an imminent police search." *United States* v. *Carter*, 999 F.2d 182, 186 n.5 (7th Cir. 1993).

Based on the significant risk that a drug dealer who has a few moments of grace before a police entry will employ them to destroy evidence, the vast majority of courts of appeals have held that such a risk is an "exigent circumstance" sufficient to justify full or substantial noncompliance with Section 3109.[11] That has been so not only in the

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warrant "saw [defendant] coming out of a bathroom and heard a toilet flushing," then retrieved a "brick of cocaine from the commode"); *United States* v. *Smith*, 887 F.2d 104, 105 (6th Cir. 1989) (officers executing warrant "discovered defendant attempting to flush cocaine down the toilet"); *United States* v. *Cordero*, 860 F.2d 1034, 1036 (11th Cir. 1988) (defendant "admits that, at the time of her arrest, 'she had destroyed a quantity of cocaine by flushing it down a toilet'").

[11] As noted above (see p. 16 n.6, *supra*), most federal courts of appeals have held that "exigent circumstances" may justify dispensing with a prior announcement under either the Fourth Amendment or 18 U.S.C. 3109. The reference to "exigent circumstances," however, can cause confusion. "Exigent circumstances" is the phrase used to describe the justification needed to dispense with a warrant altogether before entering a dwelling. See *Payton* v. *New York*, 445 U.S. 573, 585-586 (1980); *Vale* v. *Louisiana*, 399 U.S. 30, 34-35 (1970). In the context of an unannounced entry, by contrast, the officers have ordinarily obtained a warrant. Thus, a magistrate has already authorized the intrusion into the residence, and, as *Wilson* makes clear, the question is only whether it would be "reasonable" within the meaning of the Fourth Amendment to dispense with the knock-and-announce requirement. See *Ybarra* v. *Illinois*, 444 U.S. 85, 104 (1979) (Rehnquist, J., dissenting) ("[I]n judging the reasonableness of [a] search pursuant to [a] warrant, we need not measure it against jealously drawn exceptions to that requirement."). It stands to reason that an unannounced entry pursuant to a warrant may be "reasonable" under circumstances that would not justify a wholly warrantless entry into a dwelling. Indeed, in *Wilson*, this Court did not use the term "exigent circumstances" and stressed instead that an unannounced entry need only meet a "flexible" reasonableness stan-

limited class of cases in which there is evidence unique to the case either that drugs are likely to be destroyed on an announcement or that such drugs, after an announcement, are in fact being destroyed.[12] Instead, in numerous cases, the courts of appeals have allowed entry without an announcement[13] or entry simultaneous with or seconds after an announcement,[14] even though no evidence of likely de-

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dard that weighs the relevant "law enforcement interests." 115 S. Ct. at 1918. See *Bodine* v. *Warwick*, 72 F.3d 393, 398 (3d Cir. 1995) (*Wilson* adopts an overall standard of reasonableness that considers exigency as a single factor).

[12] See, *e.g.*, *Bonner*, 874 F.2d at 825-826 (sounds of possible destruction heard); *United States* v. *Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973) (sounds of scampering feet heard), cert. denied, 416 U.S. 958 (1974).

[13] See, *e.g.*, *United States* v. *Arias*, 923 F.2d 1387, 1391 (9th Cir.) (unannounced entry based on dual concern that occupants "might be destroying evidence or arming themselves"), cert. denied, 502 U.S. 840, 876 (1991); *United States* v. *Tracy*, 835 F.2d 1267, 1270 (8th Cir.) (unannounced entry based on knowledge of similar drug sites where an announcement "would cause evidence to be destroyed before the officers could surmount the anticipated hindrances to their entry"), cert. denied, 486 U.S. 1014 (1988); *United States* v. *Garcia*, 741 F.2d 363, 366 (11th Cir. 1984) (announcement excused based on belief that suspect would be "able to wash the cocaine down the sink in the kitchen or bathroom"); *United States* v. *Tolliver*, 665 F.2d 1005, 1008 (11th Cir.) (unannounced entry where announcement "would have jeopardized the availability of evidence (the cocaine) which the agents knew to be inside"), cert. denied, 456 U.S. 935 (1982).

[14] See, *e.g.*, *Kennedy*, 32 F.3d at 882 (entry immediately after announcement based on belief that "the experienced drug distributors inside the house would attempt to destroy evidence unless the agents acted quickly"); *United States* v. *Markling*, 7 F.3d 1309, 1318 (7th Cir. 1993) (entry seven seconds after announcement where suspect was believed likely to flush cocaine down toilet); *United States* v. *Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993) (entry ten seconds after announcement where occupants were "believed to possess cocaine, a substance that is easily and quickly hidden or destroyed"); *United States* v. *Keene*, 915 F.2d 1164, 1168-1169 (8th Cir. 1990) (entry immediately after

struction existed apart from the assumption that the suspects in the home would conform to the tendency of narcotics suspects to destroy such incriminating contraband if they learn of an imminent entry.

Thus, in meeting the government's burden to justify an immediate no-announce entry, it is not necessary for the police to have specific proof that destruction of evidence is likely if entry is delayed. It is unrealistic to presume that such evidence is ordinarily available. The fact that the police officers are searching for drugs that are easily disposable is sufficient to warrant a reasonable belief that the officers will face a significant risk of destruction of evidence if they allow a grace period to the occupants of the dwelling. Where officers have such a reasonable belief, the Fourth Amendment permits dispensing with a pre-entry announcement; restrictions on the manner of execution of a search warrant should not cost the police the very evidence that is the object of the warrant. See, *e.g.*, *Segura* v. *United States*, 468 U.S. 796, 816 (1984) (idea of a "'constitutional right' to destroy evidence * * * defies both logic and common sense").

There may be particular cases, however, in which the police are aware of facts that are sufficient to negate the general risk that the occupants of the dwelling will dispose of easily disposable drugs if advance notice is given before police entry. If there are such facts in a particular

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announcement based on fact that "persons who traffic in liquid narcotics often attempt to dispose of them, i.e., by pouring them down a sink or floor drain"), cert. denied, 498 U.S. 1102 (1991); *Nabors*, 901 F.2d at 1354 (entry immediately after announcement based on belief that suspect had drugs "which could be easily disposed of"); *United States* v. *Nolan*, 718 F.2d 589, 598 (3d Cir. 1993) (entry simultaneous with announcement based on belief that suspects would flush narcotics down toilet); *United States* v. *Jackson*, 585 F.2d 653, 662 (4th Cir. 1978) (entry simultaneous with announcement where suspects possessed gambling slips "susceptible of easy destruction").

case that are sufficient to make it *un*reasonable for an officer to fear the destruction of evidence, then an unannounced entry in that case would not be justifiable under the Fourth Amendment. If, for example, the officers knew that the only person at home at the time of the search is unconnected with the narcotics enterprise and that the narcotics are packaged (*i.e.*, in crates) so as to render them nondisposable within a brief period of time, then invocation of a destruction-of-evidence justification for an unannounced entry would be unreasonable.

E. Petitioner's Objections To Immediate No-Knock Entries In Narcotics Cases Are Without Merit

Petitioner and his amici curiae (Pet. Br. 38-40; Amici Br. 10-12) argue that Wisconsin's blanket rule does not allow for a case-by-case determination of reasonableness. The standard we propose, however, does so. It begins with the general principle, derived from the experience of courts and police officers in a myriad of drug cases, that an unannounced entry is ordinarily valid to execute a drug trafficking search warrant.[15] Where it applies, the princi-

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[15] Officers executing a search warrant for evidence of drug trafficking ordinarily have a greater quantum of proof bearing on the danger posed by the occupants of the dwelling than did the officer in *Terry* v. *Ohio*, 392 U.S. 1 (1968)—a case relied on by petitioner (Br. 40) as establishing the kind of particularized suspicion that is necessary to justify a Fourth Amendment intrusion. In *Terry*, this Court upheld a stop of three men and the frisk of one of them based on their having engaged in tactics that strongly suggested they "were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons." 392 U.S. at 28. The Court did not require the officer conducting the frisk to point to any further suspicion that that particular suspect actually had a gun, or that he might use it against the officer during the course of the investigative detention. Here, the warrant based on probable cause authorizing the search of petitioner's hotel room for evidence of drug trafficking supplied the

ple we advocate serves the salutary function of "establish[ing] [a] workable rule," *New York* v. *Belton*, 453 U.S. 454, 460 (1981), that, "in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement," *id.* at 458. In cases where that principle does not apply—where the police know of facts that negate the inference of personal risk and likely destruction of evidence that accompany the execution of warrants in drug trafficking cases—the officers may not dispense with a pre-entry announcement (unless, of course, other justifications for entering without a prior announcement are applicable on the facts of the given case).

Petitioner also asserts (Br. 38) that permitting the police to dispense with pre-entry announcements in narcotics cases would place absolute, unreviewable discretion in the hands of the executing officers. If it is generally reasonable for the officer to execute a narcotics search warrant without a prior announcement, however, the Fourth Amendment does not invalidate the officer's decision to do so, even if particular officers might choose to execute the warrant in a different manner. As this Court explained in *Dalia* v. *United States*, 441 U.S. 238 (1979), "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" *Id.* at 257 (footnote omitted). See also *United States* v. *Stowe*, 100 F.3d 494, 499 (7th Cir. 1996), petition for cert. pending, No. 96-7439 (filed Jan. 14, 1997); *Hummel-Jones* v. *Strope*, 25 F.3d 647, 650 (8th Cir. 1994); *United States* v. *Medlin*, 842 F.2d 1194, 1196 (10th Cir. 1988). Police executing a

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requisite particularized and individualized suspicion that petitioner might be armed and dangerous.

search warrant are in the best position to determine whether an announcement before entry would jeopardize their safety as well as the safety of the occupants and, so long as the officers remain within the bounds of Fourth Amendment "reasonableness," they may choose the means that they believe are most likely to lessen the risk of violence to all concerned. See J.A. 93.[16]

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[16] Amici ACLU, et al., also rely (Br. 16-18 & n.32, 23-24) on *Maryland* v. *Buie*, 494 U.S. 325 (1990), *Mincey* v. *Arizona*, 437 U.S. 385 (1978), and *Ybarra* v. *Illinois*, 444 U.S. 85 (1989), among others, for the proposition that the presence of a warrant to search for evidence of drug trafficking does not provide officers with the requisite particularized suspicion to justify dispensing with the announcement requirement. Their reliance on those cases is misplaced.

In *Buie*, the Court held that officers executing a warrant to arrest a robbery suspect at his home are entitled to conduct a limited protective sweep only if articulable facts warrant the belief that "the area to be swept harbors an individual posing a danger to those on the arrest scene." 494 U.S. at 334. The Court rejected the State's argument that no level of objective justification should be required because of the dangers inherent in executing an arrest warrant for a violent crime. The Court explained that "the existence of the arrest warrant implies nothing about whether dangerous third parties will be found in the arrestee's house." *Id.* at 335 n.2. The Court explicitly contrasted the situation in *Michigan* v. *Summers*, 452 U.S. 692 (1981), where the presence of a search warrant "implied a judicial determination that police had probable cause to believe that someone in the home was committing a crime." 494 U.S. at 335 n.2. The instant situation is more akin to *Summers* than *Buie*, since the search warrant constituted a judicial determination that evidence of drug trafficking would be found in the dwelling to be searched. Unlike in *Buie*, that fact *does* imply that police officers executing the warrant will face a significant risk of violence or destruction of evidence.

Similarly, in *Ybarra*, the Court held that a warrant to search a drug tavern and its bartender for narcotics did not authorize the officers executing the warrant to frisk a tavern patron absent reasonable suspicion to believe the patron was armed and dangerous: "The 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be

Petitioner notes (Br. 28-31) that some unannounced entries have been undertaken when the occupants were not threats. The Fourth Amendment, however, does not (and cannot) require that officers always be correct. To satisfy the Fourth Amendment, "what is generally demanded of the many factual determinations that must regularly be made by agents of the government * * * is not that they always be correct, but that they always be reasonable." *Illinois* v. *Rodriguez*, 497 U.S. 177, 185-186 (1990); see also *Hill* v. *California*, 401 U.S. 797, 804 (1971) ("sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment"). A rule requiring the level of specificity of knowledge of danger supported by petitioner would come only at an unacceptably high price: exposing officers to the peril that comes when armed drug traffickers are given time to mount an attack.

Amici ACLU, et al., argue (Br. 4-9) that the historical record does not support the creation of blanket exceptions to the knock-and-announce principle. Whatever the merits of that position, however, the determination of whether the risks inherent in executing warrants in drug trafficking cases are sufficient to justify an unannounced entry must be made by reference to the methods and means employed by contemporary criminal suspects. In particular, the increased firepower of modern weapons, as well as the in-

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frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." 444 U.S. at 94. Given that the warrant here established probable cause to believe that petitioner was trafficking in drugs, the police in this case had every reason to believe that petitioner and any other occupants of the hotel room might be armed and dangerous.

Finally, in *Mincey*, the Court merely held that the police may not make a warrantless search of a murder suspect's home following his arrest absent exigent circumstances. That holding sheds no light on the instant case.

creased risks such weapons pose in the hands of drug traffickers, must be taken into account in determining what is reasonable under the Fourth Amendment. Cf. *Tennessee* v. *Garner*, 471 U.S. 1, 14 (1985) (taking into account in Fourth Amendment analysis changes since the time of development of common law rules, "when weapons were rudimentary" and when "[d]eadly force could be inflicted almost solely in a hand-to-hand struggle"). This Court "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton* v. *New York*, 445 U.S. 573, 591 n.33 (1980). As this Court has observed: "Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper." *Steagald* v. *United States*, 451 U.S. 204, 217 n.10 (1981).

F. The Entry In This Case Complied With The Fourth Amendment

The officers in this case acted reasonably. Because the police officers were executing a search warrant for narcotics, it was reasonable for them to fear a significant risk of danger and destruction of evidence if they gave prior notice before entering petitioner's motel room. There is no basis on this record to challenge the police officers' reasonable belief in the risks of danger or destruction of evidence if petitioner or the other occupants of his motel room were given advance notice of the raid. Accordingly, the police were justified in entering without a prior announcement.[17]

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[17] This case does not present the question of the scope of any exclusionary rule remedy for an unlawful entry to execute a valid warrant. Although this Court has applied the exclusionary rule without comment in cases governed by the statutory command of Section

CONCLUSION

The judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted.

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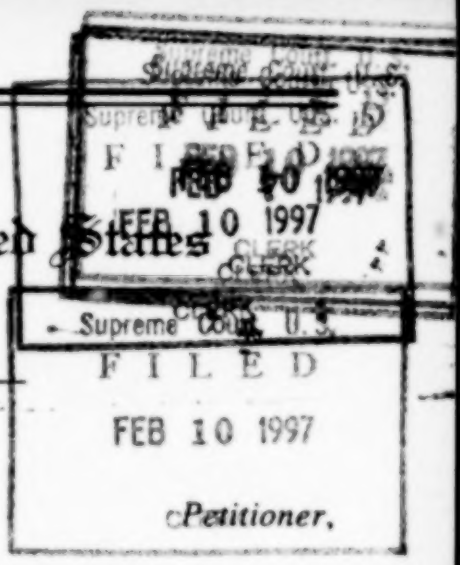
MARCH 1997

3109, see *Miller*, 357 U.S. at 313-314; *Sabbath*, 391 U.S. at 586, the Court has never addressed that issue under the Fourth Amendment. See *Wilson*, 115 S. Ct. at 1919 n.4 (declining to reach the issue). In a variety of Fourth Amendment settings, however, this Court has recognized that the exclusionary rule does not require suppression of evidence that has been or would have been acquired by a lawful source independent of a Fourth Amendment violation. See, *e.g.*, *New York* v. *Harris*, 495 U.S. 14, 18-19 (1990); *Murray* v. *United States*, 487 U.S. 533, 537 (1988); *Segura*, 468 U.S. at 813-816; *Nix* v. *Williams*, 467 U.S. 431, 443 (1984). Under that analysis, the exclusionary rule would not mandate suppression in this case, since the drugs and other evidence found in petitioner's motel room were the fruits of a search conducted pursuant to a valid warrant. Even if the mode of entry into the room were illegal, any failure to knock and announce did not produce the discovery of the evidence.

No. 96-5955



IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STEINEY J. RICHARDS,

Petitioner,

—v.—

STATE OF WISCONSIN,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF WISCONSIN

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION , THE ACLU OF WISCONSIN, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONER

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INTEREST OF AMICI [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Wisconsin is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases involving the Fourth Amendment. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the proper and fair administration of criminal justice. It has a membership of more that 9,000 attorneys and 28,000 affiliate members in 50 states. NACDL is recognized by the American Bar Association as an affiliate organization, and has full representation in the ABA's House of Delegates. NACDL strives to defend the liberties guaranteed by the Bill of Rights.

STATEMENT OF THE CASE

At 3:40 a.m. on December 31, 1991, Madison, Wisconsin police officers forcibly entered petitioner's motel room to execute a search warrant to look for illegal narcotics. Prior to the search, the magistrate who issued the warrant

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

had determined that the facts of the case were "insufficient to justify a no-knock warrant and therefore had rejected the request for a no-knock warrant." 549 N.W.2d 218, 228 n.3 (1996). Despite this judicial determination, the police did not announce their presence and purpose before entry. A search of the room revealed illegal narcotics. No guns or evidence of gun possession was discovered.

After the trial court denied the petitioner's suppression motion, he pleaded guilty to the felony of possession of cocaine base with the intent to deliver and was sentenced to a prison term. The state appellate court upheld the conviction.

The Wisconsin Supreme Court found that the entry of petitioner's motel room did not violate the Fourth Amendment. According to the court, the sole issue was whether the Fourth Amendment "allows a blanket exception to the general requirement of 'knock and announce' for entries into premises pursuant to a search warrant for felonious drug delivery." 549 N.W.2d at 220. Reaffirming its earlier decision, *State v. Stevens,* 511 N.W.2d 591 (1994), *cert. denied*, __ U.S. __, 115 S.Ct. 2245 (1995), the Wisconsin high court ruled the police could always ignore the announcement rule in felony drug cases, notwithstanding *Wilson v. Arkansas*, 514 U.S. __, 115 S.Ct. 1914, 1916 (1995), which held that notice was an essential part of the reasonableness inquiry required by the Fourth Amendment. The court ruled "that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery." 549 N.W.2d at 227.

Petitioner argues here that the exception created below, which grants officers unreviewable discretion to ignore the notice requirement, is inconsistent with Fourth Amendment norms established by this Court.

SUMMARY OF ARGUMENT

The common law did not provide blanket exceptions to the announcement requirement. State statutes and legal manuals of the framers' era adopted the notice rule without exception. Even peace officers executing warrants for easily disposable forms of contraband were required to obey the notice requirement. Exceptions to the notice requirement subsequently emerged on a case-by-case basis.

Consistent with history, this Court's modern cases applying the notice rule do not support a blanket exception that eliminates judicial review of all forcible entries into a private home to execute a search warrant for narcotics. *Wilson v. Arkansas* held that the announcement rule is part of the reasonableness inquiry under the Fourth Amendment. The holding in *Wilson*, combined with the result in *Ker v. California*, 374 U.S. 23 (1963), demonstrates that a reasonableness inquiry envisions a judicial assessment in each case of the underlying facts and applicable legal principles to determine whether a challenged entry was reasonable.

The exception adopted below ignores that principle by giving officers unreviewable discretion to decide how a Fourth Amendment safeguard will be enforced in the home. This result conflicts with many decisions of the Court rejecting police procedures that confer unlimited power to officers while intruding into a home. It matters little whether the ruling below is deemed a "narrow exception" to the notice requirement or a "bright-line" rule. The critical point is that the judgment below leaves enforcement of the announcement rule to the discretion of police officers, and eliminates judicial scrutiny whenever a search warrant for felonious drug delivery is executed. This judgement contradicts the norm that all entries into the home, even entries authorized by a judicial warrant or a recognized exception to the warrant requirement, must still pass constitutional muster under the Reasonableness Clause.

Exceptions to Fourth Amendment requirements are narrowly tailored by the urgency of the facts in a particular case. The burden is on the state to demonstrate a need for suspension of Fourth Amendment safeguards. Thus, an exception to the announcement rule due to exigent circumstances; whether they concern threats to police safety or the destruction of evidence, depends on a case-specific evaluation of the facts. Wisconsin's legitimate interest in allowing officers entering a private dwelling to take reasonable steps to neutralize a potential emergency can be accommodated within the reasonableness inquiry developed by this Court's precedents.

ARGUMENT

I. BLANKET EXCEPTIONS TO THE NOTICE RULE DID NOT EXIST UNDER THE COMMON LAW

This Court has often looked to common law principles when assessing the reasonableness of a police intrusion. In *Wilson*, a unanimous Court reaffirmed the fundamental nature of the right to notification before a forcible police entry. The same historical materials that informed the Court's judgment in *Wilson* teach that the framers of the Fourth Amendment would not have sanctioned the blanket exception to the notice rule that was created below.

Despite the fact that eighteenth century peace officers executing warrants often confronted situations that presented the potential for the destruction of evidence or for armed resistance, the common law did not provide blanket exceptions to the announcement rule.[2] Early American courts

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[2] *See Ker v. California*, 374 U.S. at 54 (opinion of Brennan, J.)("I have found no English decision which clearly recognizes any exception to the (continued...)

embraced the announcement rule for the execution of arrest and search warrants.[3] "In most states, custom, practice, or legislation required officers to request admittance into a house and break in only if they had to."[4] After the ratification of the Fourth Amendment, exceptions to the announce-

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[2] (...continued)
requirement that the police first give notice of their authority and purpose before forcibly entering a home"); Note, "Announcements in Police Entries," 80 Yale L.J. 139, 144 (1970)("Efforts to legislate a no-knock authorization were repeatedly resisted in the eighteenth century [in England], despite the fact that such powers were proposed as a means of increasing police effectiveness. American colonial experience with announcement prior to entrance was parallel to England's: execution of all warrants was made with notice. There are no reported cases in America before 1791 discussing exceptions to announcement")(footnotes omitted); Jennifer M. Goddard, Note, "The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Protection of Fourth Amendment Rights," 75 B.U.L.Rev. 449, 460 (1995)("Courts recognized exceptions [to announcement] only in those instances when the person within the home knew of the presence and purpose of the police")(footnotes omitted); Robert J. Driscoll, "Unannounced Police Entries and Destruction of Evidence After *Wilson v. Arkansas*," 29 Colum. J.L. & Soc. Probs. 1, 26 (1995)("Reported decisions from the period surrounding the ratification of the Bill of Rights do not reflect judicial acceptance of a destruction-of-evidence exception to the general rule of announcement . . . . [T]he status of the exception as a relative newcomer to knock-and-announce jurisprudence justifies a cautious approach when considering arguments that the exception should be construed broadly or that such an interpretation is consonant with the intentions of the Framers").

[3] *See, e.g., State v. Shaw*, 1 Root 134 (Conn. 1789)(arrest warrant for treason); *Kelsy v. Wright*, 1 Root 83 (Conn. 1783)(arrest warrant for lewd conduct).

[4] William Cuddihy, "The Fourth Amendment: Origins and Original Meaning, 602-1791" at 1511 (1990)(unpublished Ph.D. dissertation, Claremont Graduate School). *See, e.g., Bell v. Clapp*, 10 Johns. R. 263 (N.Y.Sup.Ct. 1813)(affirming right of officer who, after proper notice, conducted forcible entry to execute search warrant).

ment rule were developed on a case-by-case basis.[5]

Opportunities to adopt a blanket exception to the notice rule were available, but were not acted upon by the states during the framers' era. Despite a preoccupation with the illicit trade in alcohol and its easily disposable nature, eighteenth century peace officers were required to follow the announcement rule. "The statutes and legal manuals of at least seven states permitted forcible entry only after a householder had refused to admit a searcher under circumstances that included smuggling, counterfeiting, and trading with the enemy."[6] For example, a 1776 Massachusetts law governing the issuance of search warrants to discover forged bills, which could be easily destroyed in the hearth, allowed an officer to enter a home "*after* demanding of the Owner of such house . . . admittance, and if the owner of the same, or the person in his absence found therein shall not open the same immediately."[7] Similarly, a 1782 Massachusetts law on search warrants for contraband, including British rum, permitted forcible entry "if Admittance be *refused* or cannot be obtained."[8] In the early 1780's, New York, New Jersey and Pennsylvania passed laws that authorized constables to break open the doors of private homes in search of contraband alcohol, but only after the householder had refused a

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[5] *See* Goddard, *supra* n.2, at 460-64; Driscoll, *supra* n.2, at 26. *Cf.* G. Robert Blakey, "The Rule of Announcement and Unlawful Entry: *Miller v. United States* and *Ker v. California*," 112 U.Pa.L.Rev. 499, 505 (1964)(listing nineteenth century cases recognizing exceptions to common law notice rule).

[6] Cuddihy, *supra* n.4, at 1512 (footnotes listing state laws omitted).

[7] Mass. Resolve 1776-77, ch.1176, at 936 (emphasis added).

[8] Mass. Acts And Laws, 1782-83, ch.32, at 86-87 (emphasis added).

prior demand of admittance.[9]

Early federal laws also refused to adopt blanket exceptions to the notice rule. While the Collection Act of 1789 was neutral on unannounced entries, the Judiciary Act of 1789 "effectively renounced those entries by requiring [] officers to accomplish seizures and arrests through the usual legal processes of their resident states."[10] On March 3, 1791, Congress enacted a provision concerning distilled spirits that permitted inspection of homes and businesses, but officers were required to request admittance before entry.[11]

In 1917, Congress codified the common law notice rule for the execution of search warrants by federal agents.[12] Significantly, this law did not contain a blanket exception, despite congressional knowledge that warrants would be issued "in cases involving weapons . . . [and] destructible evidence such as opium and liquor."[13] Congress later extended the announcement requirement to the National Prohibition Act.[14] "In making this extension, Congress notably did not draft an exception for searches of easily destroyed evidence such as liquor."[15] The only exception

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[9] N.Y.St. sess.5, ch.39, §3 (April 13, 1782), N.Y. State Laws, vol.1 (1777-84), p.480; N.J.St., 6th Gen. Assemb., 2d Sitting, ch.XXXII, §18 (June 24, 1782); Pa.Stats. ch. CXC, §10 (1780).

[10] Cuddihy, *supra* n.4, at 1513 (footnote omitted).

[11] U.S. Stat., 1st Cong., Sess. III, ch.15, §29 (March 3, 1791).

[12] 18 U.S.C. §3109 (originally enacted as the Espionage Act, ch.30, tit.XI, §8,40 Stat.217, 228-29).

[13] Charles Patrick Garcia, Note, "The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception," 93 Colum.L. Rev. 685, 690 (1993).

[14] Ch.85, tit.I, §25, 41 Stat. 305, 315 (1919)(repealed 1933).

[15] Goddard, *supra* n.2, at 457.

referenced by Congress was the peril exception,[16] which applied on a case-by-case basis, though it was common knowledge that the organized criminals who trafficked in illegal liquor during the Prohibition era were often heavily armed.

The lack of historical evidence supporting a blanket exception to the notice rule is not surprising. Blanket intrusions were particularly pernicious to the framers because officers were given unfettered discretion to search and seize without judicial review.[17] It was considered dangerous to allow "any private man, or even any public tribunal" to consider the violation of private property justified by the common good "and to decide whether [certain practices] be expedient or no." 1 W. Blackstone, COMMENTARIES *139. A blanket exception is inimical to Fourth Amendment values for another reason: it gives officers discretion to treat unlike cases alike. Like the writs of assistance which granted British customs officers the unreviewable discretion "to search at their will,"[18] the blanket exception created below empowers officers to ignore the notice rule regardless of the

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[16] *See* 18 U.S.C. §3109 ("The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant").

[17] *Cf. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. __, 115 S.Ct. 2386, 2398 (1995)(O'Connor, J., dissenting)(acknowledging the view "that blanket searches are 'intolerable and unreasonable' is well-grounded in history").

[18] Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54 (John Hopkins Press 1937).

facts.[19] Accordingly, the historical record provides no support for the blanket exception created below, nor would the framers have sanctioned such a result.[20]

II. THE COURT'S CASES APPLYING THE ANNOUNCEMENT RULE DO NOT SANCTION A REGIME THAT GIVES OFFICERS UNREVIEWABLE DISCRETION TO FORCIBLY ENTER A HOME WITHOUT NOTICE

The above argument illustrates that a blanket exception to the knock and announce requirement contradicts common law principles and the original meaning of the Fourth Amendment. But the blanket exception sanctioned below does more than offend common law precepts. It also disregards this Court's current Fourth Amendment precedents. No ruling of this Court supports the judgment that officers have unreviewable discretion to disregard a safeguard guaranteed by the Reasonableness Clause.

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[19] Ironically, "the legislation creating the writs required that notice be given before entry was made, and reported instances of its use included notice . . . . It is fair to assume that the framers did not consider any arrest or search to be reasonable that did not include the level of announcement present even in the hated writs of assistance." Note, *supra* n.2, at 145 (footnotes omitted).

[20] *See, e.g. Ratcliffe v. Burton*, 3 Bos. & Pul. 223, 230, 127 Eng. Rep. 123, 127 (1802)(Rooke, J.)("What a privilege will be allowed to sheriffs' officers if they are permitted to effect their search by violence, without making that demand which possibly will be complied with, and consequently violence be rendered unnecessary!").

A. The Holding In *Wilson* Does Not Support A Blanket Exception To The Notice Rule, Nor Leave Enforcement Of That Rule To The Discretion Of Police Officers

Relying on its ancient roots in the common law and the legal norms that were understood and established during the framers' era, *Wilson* held that the knock and announce rule forms part of the "reasonableness inquiry under the Fourth Amendment." 115 S.Ct. at 1918. While the historical pedigree of the announcement rule left "little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure," *id.* at 1918, *Wilson* was equally clear that it was not establishing an absolute rule.

Wilson reached this Court after the Arkansas Supreme Court ruled that "[t]here is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment." 878 S.W.2d 755, 758 (1994). Rejecting this "all-or-nothing" view of the Reasonableness Clause, *Wilson* interpreted the Amendment to embody a "presumption in favor of announcement" that might sometimes yield to important state interests. 115 S.Ct. at 1918-19. *Wilson* was a careful, judicious endeavor to balance the individual's interest in privacy and physical safety protected by the announcement rule without unduly burdening the legitimate needs of law enforcement.[21]

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[21] *See* 115 S.Ct. at 1918 ("The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests"); *id.* at 1919 ("We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior (continued...)

Inattentive to the measured reasoning of *Wilson*, the court below not only announced a categorical rule that eliminates judicial review of unannounced entries where narcotics are involved, it also rejected the argument that the Reasonableness Clause controls such entries.[22] This judgment misconstrues the rationale of *Wilson*.

After acknowledging that "'the underlying command of the Fourth Amendment is always that searches and seizures be reasonable,'" *Wilson*, 115 S.Ct. at 1916, quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), the *Wilson* Court held that the announcement rule "is an element of the reasonableness inquiry under the Fourth Amendment." *Wilson*, 115 S.Ct. at 1918. The Court also recognized that a "reasonableness inquiry" would accommodate exceptions to the notice rule, depending on the specific facts of the case.[23] This holding does not, however, recommend the creation of a blanket rule.[24] Rather, *Wilson* contemplated

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[21] (...continued)
announcement, law enforcement interests may also establish the reasonableness of an unannounced entry").

[22] *See* 549 N.W.2d at 222 ("Richards further contends that *Wilson* requires a reasonableness analysis be performed for every unannounced search and seizure. We disagree").

[23] *Id.* at 1918-19 (noting cases where the "presumption in favor of announcement would yield under circumstances presenting a threat of physical violence"; "a prisoner escapes from [custody] and retreats to his dwelling"; and "officers have reason to believe that evidence would likely be destroyed")(citations omitted).

[24] The reasonableness analysis in *Wilson* is consistent with the Court's recent Fourth Amendment rulings. For example, last Term in *Ohio v. Robinette*, 519 U.S. __, 117 S.Ct. 417 (1996), the Court rejected the Ohio Supreme Court's imposition of a bright-line rule for determining whether a motorist's detention continued after an officer requested consent to search the vehicle after completing a traffic stop. This Court re-
(continued...)

that this "reasonableness inquiry" would entail a state court's assessment of the underlying facts and analysis of legal principles. *Wilson*'s holding, which eschewed rigid, inflexible rules, is an incongruous precedent for a blanket, inflexible rule that renounces judicial review and permits officers to ignore the constraints of the Reasonableness Clause when executing a search warrant for drugs in a private home.[25]

The court below concedes, as it must, that Wisconsin officers will make choices when executing an entry into private premises.[26] But instead of recognizing that the choices made by officers are reviewable under the standards of reasonableness mandated by the Fourth Amendment, the court insulates those choices from all judicial scrutiny. That view cannot be reconciled with either the Reasonableness Clause or this Court's decisions.

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[24] (...continued)
iterated that the issue of seizure depends on a reasonableness analysis that considers the totality of the circumstances.

[25] Significantly, *Wilson* declined Arkansas' invitation to decide whether there were sufficient factual exigencies in the case that justified the denial of notice. Because the Arkansas Supreme Court had not addressed those points, *Wilson* remanded the case "to allow the state courts to make any necessary *findings of fact* and to make the determination of reasonableness in the first instance." 115 S.Ct. at 1919 (emphasis added). The Court's remand order obviously requires an evaluation of the specific facts in the case and a judicial determination of reasonableness. A rigid assumption about all police entries, which is the response of the court below, does not satisfy *Wilson*'s demands.

[26] *See* 549 N.W.2d at 225 ("In some cases, police officers will undoubtedly decide that their safety, the safety of others, and the effective execution of the warrant dictate that they knock and announce; in other cases, they might decide that such a procedure would be counterproductive or even dangerous").

B. Eight Justices In *Ker v. California* Agreed That The Reasonableness Of An Unannounced Entry Justified By Exigent Conditions Should Be Assessed By The Judiciary On The Facts And Circumstances Of Each Case

While *Wilson* confirmed that the notice rule is protected by the Reasonableness Clause, it did not clarify the scope of potential exceptions to the rule. However, the plurality and dissenting opinions in *Ker v. California*, 374 U.S. 23, analyzed how the facts in a particular case may affect enforcement of the rule. Both opinions confirm that a blanket exception for unannounced entries is incompatible with the reasonableness inquiry applied by this Court.

First, a nearly unanimous Court in *Ker* explained that the judicial inquiry required under the Reasonableness Clause is best implemented through a case-by-case method. Thus, eight Justices agreed with the statement that:

> . . . standards of reasonableness under the Fourth Amendment are not suspectible of Procrustean application . . . . [T]he reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment.

Id. at 33.

Reading *Ker* to authorize a blanket exception that eliminates judicial review and leaves enforcement of the notice rule to police discretion turns its reasoning upside-down. Eight Justices in *Ker* also agreed with the conclusion that state court findings on Fourth Amendment questions were

subject to independent review:

> [This Court will] . . . where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental -- i.e., constitutional -- criteria established by this Court have been respected.

Id. at 34.[27] Because *Ker* held that it was crucial for this Court to independently review the judgment of state courts regarding the reasonableness of an unannounced entry, *a fortiori*, state courts must undertake their own judgment of the reasonableness of an unannounced entry on a case-by-case basis; they cannot shift their constitutional functions to the discretion of officers.

Concerning the merits of the unannounced entry in *Ker*, Justice Clark's plurality opinion did not hold that such an entry is lawful *whenever* officers have grounds for a warrantless entry into a home involving narcotics. Rather, after considering the totality of the facts, he found that the unannounced entry was valid due to the exigent circumstances of the case.[28] While a minority has read *Ker* to endorse a blanket rule, Professor LaFave correctly notes that:

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[27] *Accord Ornelas v. United States*, 517 U.S. __, 116 S.Ct. 1657 (1996) (trial court's determination on the question of reasonable suspicion or probable cause should be reviewed by an appellate court under a *de novo* standard).

[28] 374 U.S. at 40 ("Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police")(footnote omitted).

> A close reading of *Ker* makes it clear that the plurality and dissenting opinions are not in disagreement as to whether a blanket . . . rule is called for, but only as to the sufficiency of the showing of particulars in that case. In approving the failure to give notice, the plurality opinion stressed that *in addition* to the fact that the narcotics "could be easily destroyed" there also existed "ground for the belief that [Ker] might well have been expecting the police" because of his earlier furtive conduct.[29]

Nor does the rationale of Justice Brennan's *Ker* opinion support the blanket exception created below. Relying on common law cases, he concluded that an unannounced entry was barred unless "circumstances exist in the *particular* case which allow an unannounced entry."[30]

In sum, eight members of the Court in *Ker* analyzed the specific facts of that case to determine the validity of the unannounced entry. In contrast, the judgment below upheld the unannounced, forcible entry of petitioner's hotel room with no consideration of the specific facts as required by *Ker*.

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[29] 2 Wayne F. LaFave, SEARCH AND SEIZURE §4.8(a) at 612 (3d ed. 1996). LaFave's reading of *Ker* is supported by Justice Clark's statement that the Court was "hold[ing] that in the *particular circumstances of this case* the officers' method of entry . . . was not unreasonable under the standards of the Fourth Amendment." *Ker*, 374 U.S. at 40-41 (emphasis added).

[30] 374 U.S. at 63 (footnote omitted). Justice Brennan read the common law cases to proscribe unannounced entries except where those within are aware of the officers' presence and purpose, or where there is imminent peril to persons, or where those within, made aware of the officers' presence, are destroying evidence or attempting to escape. *Id.* at 47.

III. WHETHER THEY ARE CALLED "NARROW EXCEPTIONS" OR "BRIGHT-LINE" RULES, PROCEDURES THAT GRANT OFFICERS THE POWER TO DECIDE HOW FOURTH AMENDMENT SAFEGUARDS WILL BE ENFORCED IN THE HOME HAVE BEEN CONSISTENTLY REJECTED BY THIS COURT

Because of the historic and constitutional respect accorded the home, this Court has consistently rebuffed police intrusions that expose the privacy of the home "to the discretion of the official in the field." *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967). Although the court below states that it is not creating a blanket rule, but only "a narrow exception to the general rule [of notice]," 549 N.W.2d at 222, the label attached to this discretionary power is constitutionally irrelevant. The critical point is that the judgment below leaves enforcement of the notice rule to the discretion of officers, and eliminates judicial scrutiny of unannounced entries whenever a search warrant for felonious drug delivery is challenged. Apart from its misreading of *Wilson* and *Ker*, this ruling cannot be reconciled with this Court's other precedents that constrain discretionary police power in the home.

Even in situations where officers hold a valid warrant or grounds exist justifying an exception to the warrant rule, this Court's decisions consistently reject attempts to piggyback discretionary powers onto a legitimate police intrusion. For example, *Maryland v. Buie*, 494 U.S. 325 (1990), dismissed a claim that officers who execute an arrest warrant in a home for a violent felon have *carte blanche* authority to undertake a protective sweep of that home. Aware of the potential dangers that confront officers anytime they venture onto a suspect's turf, *Buie* nonetheless held that a protective sweep is constitutional only upon "a reasonable belief based

on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 337.

The holding in *Mincey v. Arizona*, 437 U.S. 385 (1978), also is an obstacle to the "narrow exception" created below. Motivated by concerns similar to those that influenced the ruling below, the Arizona Supreme Court afforded police the discretion to search a home whenever a homicide occurs within because that crime invariably constitutes an emergency situation. Without questioning the state's interest in "making warrantless entries and searches when [officers] reasonably believe that a person within is in need of immediate aid," *id.* at 392-93, *Mincey* unanimously dismissed Arizona's categorical exception to the warrant requirement. Neither the "vital public interest in the prompt investigation of the extremely serious crime of murder," the existence of overwhelming evidence of Mincey's guilt, nor the fact that Mincey had already been lawfully arrested in his home, was sufficient to justify a discretionary police intrusion. *Id.* at 392-94. *See also Thompson v. Louisiana*, 469 U.S. 17 (1984)(*per curiam*).

The holding of *Chimel v. California*, 395 U.S. 752 (1969), similarly illustrates the Court's rejection of categorical rules that expand police discretion inside a home. There, officers had lawfully arrested Chimel inside his home. After completing the arrest, officers then, without a warrant, conducted an extensive search of the house.

In his dissent, Justice White saw nothing illegal in the search and urged adoption of what amounted to an automatic rule. According to Justice White, the search in *Chimel* was valid provided that "the existence of probable cause is independently established and would justify a warrant for a

broader search."[31] The *Chimel* majority, however, rejected the dissent's invitation to expand the discretion of arresting officers and concluded that the challenged search exceeded the permissible limits of a valid search incident to arrest. The Court explained that police intrusions of the home cannot be "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct." *Id.* at 764-65. The lawful arrest in Chimel's home did not justify a further invasion of his privacy and personal security even when that additional intrusion is considered "minor" in comparison to the lawful arrest.[32]

Despite the well-established constitutional command to

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[31] *Id.* at 780. Justice White defended this position based on, *inter alia*, his view that "the fact of arrest supplies an exigent circumstance justifying police action before the evidence can be removed." *Id.*

[32] *Buie*, *Mincey* and *Chimel* are by no means the only decisions of this Court that reject procedures that make law enforcement officers the final arbiters on how Fourth Amendment safeguards will be enforced in the home. The imperative of restraining police discretion was reaffirmed in *Payton v. New York*, 445 U.S. 573 (1980). There officers had substantial probable cause to arrest, and sought to effectuate those arrests inside of the homes of the defendants. The Court ruled that, absent exigency, the Fourth Amendment required the approval of a magistrate before police breach the entrance of a person's home. *Id.* at 589. *Cf. Arizona v. Hicks*, 480 U.S. 321 (1987)(lawful police entry of a home due to exigency does not authorize search of an object that lacks probable cause to be associated with criminal conduct). Finally, although the search in *Ybarra v. Illinois*, 444 U.S. 85 (1979), occurred at a public tavern, the lesson it teaches -- namely, the possession of a search warrant does not excuse officers from complying with other Fourth Amendment restraints when executing that warrant is, *a fortiori*, applicable to searches in the home. In *Ybarra*, while executing a search warrant for narcotics of a tavern and its bartender, officers also frisked patrons of the bar. The Court ruled that the warrant itself provided no authority to frisk the patrons at the officers' discretion. Those searches were valid only if the police had individualized, reasonable suspicion that the persons searched were armed and presently dangerous. *Id.* at 91-94.

restrain discretionary intrusions, the court below insists that "the officers executing a search warrant are in the best position to decide how to take command of [a] situation," and thus it is "constitutionally reasonable to allow officers in the field to decide what course of action to pursue instead of requiring them to 'take unnecessary risks.'" 549 N.W.2d at 225 (citations omitted). The flaw in this judgment is not the conclusion that officers in the field are in the best position to gauge the surroundings involved with entering private premises. We agree that officers have the initial responsibility for deciding how to proceed when executing a search warrant. The court below, however, erred in concluding that officers in the field must have both the first and final word on whether an unannounced entry should have occurred in a particular case. As this Court explained in *United States v. U.S. District Court*, 407 U.S. 297, 317 (1972), when confronted with a similar claim of law enforcement privilege:

> [T]hose charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy . . . ."

All of the above cases illustrate a legal norm overlooked by the Wisconsin Supreme Court. Law enforcement officials should not be relied upon to determine whether Fourth Amendment safeguards have been properly observed during a police invasion of a home. A police entry into a home, even an entry authorized by a warrant or a recognized exception to the warrant rule, must still pass constitutional muster under the Reasonableness Clause. To say that

police officers can never be the sole judges of whether the notice rule has been properly applied will not mean that notice must always been given. But it is a radical step to permanently exclude police entries of a home from judicial scrutiny and from the command of the Reasonableness Clause.

Concededly, the holding in *Michigan v. Summers*, 452 U.S. 692 (1981), grants officers "automatic" authority to detain occupants of a home while executing a warrant to search for contraband.[33] But the detention allowed in *Summers* was "an incremental intrusion on personal liberty," *id.* at 703, whereas even critics of the notice rule concede that unannounced entries *do* jeopardize significant privacy interests.[34] More importantly, this Court subsequently explained that the detention in *Summers* was justified because "the search warrant implied a judicial determination that police had *probable cause* to believe that someone in the home was committing a crime." *Buie*, 494 U.S. at 334 n.2 (emphasis added). But a search warrant for felonious narcotics implies nothing about the authority of the police to make an unannounced entry. That is the point of *Wilson*, where the Court concluded that, standing alone, the warrants to search and arrest Sharlene Wilson in her home implied nothing about the authority of the police to make an unannounced entry.

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[33] *Summers* held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705 (footnotes omitted).

[34] Michael R. Sonnenreich & Stanley Ebner, "No-Knock and Nonsense, An Alleged Constitutional Problem," 44 St. John's L.Rev. 626, 647 (1970).

IV. EXCEPTIONS TO FOURTH AMENDMENT REQUIREMENTS DUE TO EXIGENT CIRCUMSTANCES, WHETHER THEY CONCERN POLICE SAFETY OR THE DESTRUCTION OF EVIDENCE, TURN ON A CASE-SPECIFIC EVALUATION OF THE FACTS

The Court's Fourth Amendment rulings have been sensitive to the needs of law enforcement, particularly to the concern of police safety. When police safety is at stake, the Court has shown acute awareness of the practical realities that confront officers in their interactions with criminal suspects. As in other Fourth Amendment contexts, the Court's cases balance the rights of individuals against the interests of society in effective law enforcement and in not creating undue risks for officers in the field. Thus, where exigent circumstances exist, whether concerning the destruction of evidence, *see Schmerber v. California*, 384 U.S 757, 771 (1966), or threats to police safety, *see Terry v. Ohio*, 392 U.S. 1 (1968), officers are often excused from compliance with traditional Fourth Amendment requirements. The state, however, "bear[s] a heavy burden when attempting to demonstrate an urgent need that might justify" an exception to traditional Fourth Amendment requirements. *See Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984).

A. Categorical Rules Are Rarely Used To Judge The Reasonableness Of Discretionary Police Conduct, Even In Contexts That Raise Legitimate Concerns About Police Safety

The blanket rule created below rests primarily on the court's concern about police safety.[35] While police safety

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[35] While the death of even a single officer is one death too many, the (continued...)

is a state interest that often is an element of the reasonableness inquiry, there is sparse precedent for a judgment that entirely eliminates judicial review of discretionary police conduct that implicates Fourth Amendment interests. The Court's classic statement on the balancing required where officer safety is weighed against Fourth Amendment interests is *Terry v. Ohio*, 392 U.S. 1.

Terry posed a confrontation between the interest of every person to be free of police inquiry as he or she walks the streets, and the authority of a police officer to frisk for weapons "to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* at 23. Like the reactions of officers who must decide on how entry into private premises will be managed, *Terry* recognized that a frisk involves police conduct that is "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat." *Id.* at 20. Despite the risks inherent in any given police-citizen encounter, *Terry* did not adopt a rigid rule permitting frisks in all street confrontations. A frisk is permissible only where a reasonable and articulable suspicion exist that a suspect is armed and presently dangerous. *Id.* at 30.

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[35] (...continued)
statistics cited below concerning the death of officers by firearms are over ten years old. *See* 549 N.W.2d at 224 n.9. Moreover, none of the statistics cited indicate whether those officers killed were executing search warrants for narcotics in a private home. A more recent study by the Federal Bureau of Investigation analyzed deaths of officers in 1994. That report notes that 76 officers were killed in 1994. *See* Uniform Criminal Reports, "Law Enforcement Officers Killed and Assaulted Publication 1994" at 3 (Federal Bureau of Investigation 1996). Of the 76 officers killed in 1994, only three officers were killed in arrests for drug related matters. *Id.* at 43, 44 & 47. One of those deaths involved an officer attempting an entry into a private residence to make an arrest. *Id.* at 44.

This Court has consistently employed *Terry*'s contextual approach when weighing Fourth Amendment rights against the state's legitimate interest in protecting officers against threats to their safety.[36] For example, in *Maryland v. Buie*, 494 U.S. 325, *Terry*'s balancing formula was utilized to determine when a protective sweep of a home was permissible when executing an arrest warrant for a violent felon. Maryland argued that a protective sweep, designed to ensure the safety of officers, was permitted whenever officers make an in-home arrest for a violent crime. Without disputing the state's concern that the "risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter," 494 U.S. at 333, *Buie* turned down the state's submission that no level of objective justification is required for a protective sweep "because of 'the danger that inheres in the in-home arrest for a violent crime.'"[37]

Following the reasoning of *Terry*, *Buie* ruled that a protective sweep is lawful if "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to

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[36] *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983)(recognizing that roadside encounters pose risks to investigating officers, *Terry*'s rationale permits a search of the passenger compartment of a car for weapons where there is reasonable grounds that a motorist is dangerous and may gain access to weapons); *Adams v. Williams*, 407 U.S. 143 (1972)(frisk permitted where officer reasonably believed that suspect in car was a threat to officer's safety).

[37] *Id.* at 334 n.2. Much like the argument relied on below, Maryland contended that every in-home arrest poses an inherent exigency for the arresting officers: "The State argues that '[o]fficers facing the life threatening situation of arresting a violent criminal in the home should not be forced to pause and ponder the legal subtleties associated with a quantum of proof analysis." *Id.* This argument was rejected.

those on the arrest scene." 494 U.S. at 334. In contrast to the decision below, *Buie* declared that the intrusion it authorized was "decidedly not 'automati[c],'" *id.* at 336, and would ultimately turn on the specific facts of each case. *See id.* at 334 n.2 ("Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted. That approach is applied to the protective sweep of a house").

Another notable instance where the Fourth Amendment's applicability to an investigatory encounter did not depend on an "all-or-nothing" resolution was *Tennessee v. Garner*, 471 U.S. 1 (1985). The issue was whether an officer could use deadly force to arrest an apparently unarmed fleeing felon. State officials argued that the imposition of constitutional rules in this context would "require[] the police to make impossible, split-second evaluations of unknowable facts." *Id.* at 20. While not "deny[ing] the practical difficulties of attempting to assess the suspect's dangerousness," *id.* at 20, *Garner* unequivocally rejected the claim that the Fourth Amendment had nothing to say about *how* an arrest is executed. The reasonableness requirement did control how officers would effectuate an arrest, and objective standards would dictate when deadly force could be used. Thus, probable cause to arrest did not authorize the use of deadly force unless a suspect "poses a threat of serious physical harm, either to the officers or to others." *Id.* at 11. Applying this criteria to the specific facts in *Garner*, the Court concluded that the use of deadly force was unreasonable. *Id.* at 20-21.[38]

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[38] The holding in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(*per curiam*), is not pertinent to this case. *Mimms* gave officers discretion to order a driver out of a car during a lawful traffic stop. *Mimms* found

(continued...)

Wisconsin's legitimate interest in allowing officers executing a search warrant for narcotics to take reasonable steps to neutralize a threat of peril can be accommodated within the reasonableness inquiry developed by this Court's precedents. These precedents dictate that an unannounced entry is permissible only where officers have reasonable grounds, based on the specific facts of the case, to believe that knocking and announcing their presence would threaten the safety of the officers or third parties.[39] Rather than follow

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[38] (...continued)
that the state's interest in officer safety justified the order to exit the vehicle, which the Court saw as a *de minimis* intrusion, hardly rising to the "'level of a petty indignity.'" *Id.* at 111 (citation omitted). The interest in announcement before a forcible police entry carries greater constitutional significance compared to the minimal interest in *Mimms*. Besides, the blanket rule approved in *Mimms* involved an automobile which has never been afforded the same degree of constitutional privacy given to a private dwelling. As then-Justice Rehnquist remarked in *Rakas v. Illinois*, 439 U.S. 128, 148 (1978): "We have on numerous occasions pointed out that cars are not to be treated identically with houses or apartments for Fourth Amendment purposes."

[39] We believe the Court's cases embrace the probable cause standard as the applicable standard for establishing exigent circumstances to justify suspension of the announcement. *See, e.g., McDonald v. United States*, 335 U.S. 451, 454-55 (1948); *Johnson v. United States*, 333 U.S. 10, 15 (1948); *United States v. Santana*, 427 U.S. 38, 42 (1976)(noting that in *Warden v. Hayden*, 387 U.S. 294 (1967), the Court "recognized the right of police, who had *probable cause* to believe that an armed robber had entered a house a few minutes before," to make a warrantless entry)(emphasis added); *Minnesota v. Olson*, 495 U.S. 91, 100 (1990)(agreeing with the state court's "fact-specific" application of the exigent circumstances test, after state court concluded "there must be at least *probable cause* to believe" that certain factors were present in the case)(emphasis added); *Welsh v. Wisconsin*, 466 U.S. at 759 (White, J., dissenting)("[I]f, under all the circumstances of a particular case, an officer has *probable cause* to believe that the delay involved in procuring an arrest warrant will gravely endanger the officer or other persons or will result in the
(continued...)

these precedents, the lower court assumed that every search warrant for narcotics creates its own exigency.[40] This assumption is inconsistent with another basis norm of this Court's Fourth Amendment cases: the seriousness of a crime does not create its own exigency to justify deviation from Fourth Amendment requirements. *Mincey*, 437 U.S. at 394.[41] Just as an arrest of a violent felon does not create

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[39] (...continued)
suspect's escape," a warrantless entry should not depend on the nature of the offense)(emphasis added). We also recognize, however, that where police-citizen confrontations raise legitimate concerns of police safety and the challenged intrusion does not rise to the level of a full scale search or arrest, the Court has utilized the reasonable suspicion standard articulated in *Terry*. *See* p.22, *supra*. We submit that the circumstances of an unannounced, forcible entry merit the Court's most stringent standards, rather than the lesser standards imposed under *Terry* and its progeny. At a minimum, exigency in this context must be measured by the specific facts confronting officers in a particular case. Any other result defies the "central teaching of this Court's Fourth Amendment jurisprudence" -- which is -- "a demand for specificity in the information upon which police action is predicated." *Terry*, 392 U.S. at 21 n.18.

[40] *See* 549 N.W.2d at 222 n.6 (rejecting the state's submission that the police need reasonable suspicion prior to an unannounced entry. "Our holding is based on the assumption that drug dealers will have weapons and pose a danger to officers, and that drug dealers will destroy evidence or at least attempt to destroy evidence after announcement by the police").

[41] *See also Minnesota v. Olson*, 495 U.S. 91 (affirming judgment where the state court found lack of exigency justifying a warrantless entry into a home to arrest suspect in murder-robbery crime); *Payton v. New York*, 445 U.S. 573 (warrantless entry to conduct routine arrest of defendants, a murder suspect and an armed robbery suspect, violated Fourth Amendment); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970)("We decline to hold that an arrest on the street can provide its own 'exigent circumstance' so as to justify a warrantless search of the house"); *cf. U.S. District*, 407 U.S. 297 (acknowledging the importance and sensitive nature of domes-
(continued...)

its own exigency, it should not be assumed that a search warrant for narcotics always creates exigent circumstances. A contrary result flies in the face of *Wilson*, which held that, despite the issuance of arrest and search warrants for a defendant who had earlier threatened a police informant, the specific entry to execute those warrants was subject to a reasonableness inquiry, and that state courts were required to make initial "findings of fact and to make the determination of reasonableness in the first instance" before an unannounced entry could be declared constitutionally valid. *Wilson*, 115 S.Ct. at 1919.

B. Whether The Destruction Of Evidence Exception Exists To Justify Lack Of Notice Is Decided On A Case-By-Case Basis

In several cases, this Court has addressed claims that an exigency justified departure from traditional Fourth Amendment safeguards in order to preserve evidence of a crime, or to apprehend a suspect. In each case, the government's

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[41] (...continued)
tic security issues, but concluding that the President's authority in this area "must be exercised in a manner compatible with the Fourth Amendment").

The dicta in *Washington v. Chrisman*, 455 U.S. 1 (1982), does not alter this rule. The issue in *Chrisman* was whether an officer may accompany an arrested person into his residence and seize contraband discovered in plain view. The Court held that "it is not 'unreasonable' . . . for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest." *Id.* at 7. In reaching this holding, the Court remarked that "[e]very arrest must be presumed to present a risk of danger to the arresting officer." *Id.* This dicta concerned the interest of an officer in maintaining "custodial authority" over an arrestee, and was not meant as a license to free arresting officers from other Fourth Amendment restrictions that control the arrest context.

claim of exigency was evaluated on the particular facts of the case. Starting with *Johnson v. United States*, 333 U.S. at 15, the Court scrutinized the particular facts of that case to assess whether, after the police had detected the odor of burning opium, a warrantless entry into the defendant's hotel room was justified by exceptional circumstances. One year later, in *McDonald v. United States*, 335 U.S. 451, the Court explained that, when the government seeks exemption from constitutional norms designed to protect the privacy of the home, it must prove "that the exigencies of the situation made that course imperative." *Id.* at 456. In *McDonald*, the facts revealed no fleeing defendant, nor was there an indication that crucial evidence of a crime was "in the process of destruction nor as likely to be destroyed as the opium paraphernalia in the *Johnson*." *Id.* at 455.[42]

Later, in *Schmerber v. California*, 384 U.S. at 771, the Court concluded that "[g]iven the special facts" of that case, the warrantless removal of blood from a drunk-driving suspect in a hospital setting was permissible.[43] In *Warden v. Hayden*, a warrantless entry of a home was upheld because, "[u]nder the circumstances of this case, 'the exigencies of the situation made that course imperative.'" 387 U.S. at 298

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[42] The concurring and dissenting opinions in *McDonald* agreed with the majority's conclusion that exigency for a warrantless entry is judged by the particular facts of the case. Thus, Justice Jackson stated: "Even if one were to concluded that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case." *Id.* at 459 (Jackson, J., concurring). And Justice Burton's dissent explained: "Under the circumstances, a prompt entry by the police was justified when they reasonably suspected that the crime of numbers lottery was being committed at that moment." *Id.* at 462 (Burton, J., dissenting).

[43] At the end of its opinion, *Schmerber* noted that "[i]t bears repeating . . . that we reach th[e] judgment [that the Fourth Amendment was not violated] only on the facts of the present case." *Id.* at 772.

(citation omitted). Finally, in *Vale v. Louisiana*, 399 U.S. 30, the Louisiana Supreme Court validated a warrantless entry and search of Vale's home after officers had observed Vale emerge from his home and consummate a drug transaction with another person in front of the house. The Louisiana court found "the search independently supportable because it involved narcotics, which are easily removed, hidden, or destroyed." *Id.* at 34. After reiterating that "the burden rests on the State to show the existence of [] an exceptional situation," *id.*, *Vale* concluded that the "record before us" provided no exigency to justify the warrantless search. *Id.* Concerning the need for an immediate intrusion due to the possible destruction of evidence, *Vale* noted that "[t]he goods ultimately seized were not in the process of destruction." *Id.* at 35. Although Justice Black's dissent disputed the Court's conclusion that it was necessary to show that evidence was "in the process of destruction," Justice Black agreed with the majority's conclusion that exigency turns on the particular facts of the case. *Id.* at 36.

In sum, the Court's cases uniformly require that the destruction of evidence exception be judged by scrutinizing the totality of the facts in a particular case. The judgment below ignores this mandate and would suspend an important Fourth Amendment norm on the belief that "the announcement rule [is] no longer valid in today's drug culture." 549 N.W.2d at 221. Of course, Fourth Amendment interests do not depend on the ebb and flow of the government's success in its war on drugs. The rights protected by that provision, while not absolute, are constant.

CONCLUSION

For the reasons stated above, the judgment of the Wisconsin Supreme Court should be reversed.

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October Term, 1996

STEINEY J. RICHARDS,
Petitioner,

vs.

STATE OF WISCONSIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF
AMICI CURIAE
OF
AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

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STATUTES AUTHORIZING JUDICIAL PREAPPROVAL OF UNANNOUNCED ENTRIES APPROPRIATELY ADDRESS THE SAFETY CONCERNS OF OFFICERS WHILE IMPOSING THE OBJECTIVITY AND DETACHED NEUTRALITY OF A MAGISTRATE.

SUCH STATUTES, HOWEVER DESIRABLE FROM A PUBLIC-POLICY PERSPECTIVE, ARE NOT A CONSTITUTIONAL IMPERATIVE. THE "REASONABLENESS CLAUSE" OF THE FOURTH AMENDMENT DOES NOT MANDATE JUDICIAL PREAPPROVAL OF THE EXACT MANNER IN WHICH WARRANTS MUST BE EXECUTED. 5

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This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The International Narcotic Enforcement Officers Association, Inc. (INEOA), is the largest organization of drug law enforcement officers in the world, consisting of more than 10,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among law enforcement officers. It is interested in the effective administration of justice and in protecting the safety and rights of law enforcement as well as respecting the rights guaranteed to all under the Constitution.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the

standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of executing and overseeing the process of search warrants within the bounds of the law; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of policy on the execution of search warrants.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

STATEMENT OF THE CASE

The Supreme Court of Wisconsin ruled in *State v. Richards*, 549 N.W.2d 218 (Wis. 1996), that the police are not required to adhere to the rule of "knock and announce" when executing a search warrant involving felonious drug delivery. The court said that exigent circumstances that are always present when executing search warrants involving felonious drug delivery include the extremely high risk of serious, if not deadly, injury to the police and the potential for disposal of drugs prior to police entry to serve a warrant.

The Wisconsin court adopted a blanket rule to the effect that it is reasonable to dispense with the knock and announce

requirements that the United States Supreme Court said in the case of *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), is part of the Fourth Amendment reasonableness requirement. The *Wilson* Court did indicate that exceptions could be made to the general knock and announce requirement based upon exigent circumstances, but the petitioner is expected to argue in this case that such exceptions must be made on a case-by-case basis, not across the board for a class of cases, as the Wisconsin court has done.

SUMMARY OF ARGUMENT

Amici take the position that the Wisconsin court is correct; that in search warrant cases involving felonious drug charges, the risk of injury or death to the executing officers is so great that in this class of cases the officers are constitutionally excused from the knock and announce requirement within the parameters of the Court's discussion in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), of exigent circumstances.

Statutes that authorize the judicial preapproval of unannounced entries appropriately address the safety concerns of officers while imposing the objectivity and detached neutrality of a magistrate. They are to be encouraged. Nevertheless, while they are desirable from a public-policy perspective, they are not a constitutional requirement. The "reasonableness clause" of the Fourth Amendment does not require judicial preapproval of the exact manner in which warrants must be executed.

ARGUMENT

BECAUSE OF THE VERY REAL POSSIBILITY OF PERSONAL DANGER, AND THE DESTRUCTION OF CONTRABAND, POLICE OFFICERS ARE USUALLY JUSTIFIED IN MAKING AN UNANNOUNCED ENTRY TO EXECUTE A DRUG-RELATED SEARCH WARRANT.

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SUCH STATUTES, HOWEVER DESIRABLE FROM A PUBLIC-POLICY PERSPECTIVE, ARE NOT A CONSTITUTIONAL IMPERATIVE. THE "REASONABLENESS CLAUSE" OF THE FOURTH AMENDMENT DOES NOT MANDATE JUDICIAL PREAPPROVAL OF THE EXACT MANNER IN WHICH WARRANTS MUST BE EXECUTED.

In *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), the Court took up the question of whether the Fourth Amendment requires that police officers knock and announce their presence and purpose before executing search warrants on premises. In an unanimous opinion written by Justice Thomas, this Court adopted the common law rule for the first time as constitutionally required.

The Court then went on to hold that the exception urged by the brief filed by *amici* in that case based upon proper law enforcement interests should be recognized. "[A]lthough a search and seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." 115 S. Ct. at 1919.

The Court cited case law authority for three types of situations where unannounced entries have been found reasonable under the Fourth Amendment: (1) officer safety, (2)

escaped prisoners, and (3) risk of destruction of evidence. The Court, however, made it clear that this might be a short list, noting that "we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment." 115 S. Ct. at 1919.

The Court did not deal with a host of other issues suggested by the decision. One is the issue dealt with by the Wisconsin Supreme Court in this case, i.e., whether the class of cases dealing with felony drug charges excuses compliance with the knock and announce requirement.

The *Richards* opinion quotes many newspaper accounts and academic studies and reports illustrating the special dangers that law enforcement officers face in this class of cases. *Amici* will not repeat these sources but can add that our experience as law enforcement administrators and officials supports the conclusion that this class of cases is so fraught with danger for law enforcement officers that an across-the-board exemption from the *Wilson* rule is justified.

The danger law enforcement officers face in drug cases is so obvious that some courts have taken judicial notice of it. In the recent case of *State v. Curtis*, 681 So. 2d 1287 (La. App. 1996), for example, in the context of weapons' frisks of drug suspects, the court stated:

> Common sense dictates that a police officer should be permitted to pat-down a suspect who reasonably appears to be dealing drugs. *We can take notice that drug traffickers and users have a violent lifestyle, which is exhibited by the criminal element who are generally armed due to the nature of their illicit business.* Therefore, a police officer should be permitted to frisk a suspect following an investigatory stop (based on reasonable suspicion) relating to drug activities. . . .

681 So. 2d at 1292 (emphasis added).

As noted in *Wilson*, some states have adopted statutes regulating the knock and announce procedure. For example, Nebraska Revised Statutes section 29-411; New York Code of Criminal Procedure section 690.05; North Dakota Century Code section 29-29-01; North Dakota Rule of Criminal Procedure 41; Utah Code Annotated section 77-23-210; and Wisconsin Statutes Annotated section 968.12. The statutory formulation of the knock and announce procedure is a process that *amici* support as a means of giving law enforcement officers clear guidelines on this subject. Two examples of these statutory provisions are found in the Appendix to our brief.

As noted by one commentator, Burkoff: "A handful of courts has held that executing officers should be able to follow a blanket rule permitting such 'no-knock' entries in certain discrete categories of cases, like all searches for narcotics or of places where weapons are known to be present." J. Burkoff, Search Warrant Law Deskbook at 12-19 (1996).

While Burkoff contends that the constitutionality of a blanket approach to exigency under *Wilson* may be "questionable," *amici* know from our perspective that the practical realities of the pervasive dangers involved in felony drug cases would support a rule similar to that adopted by the Wisconsin court.

Flexibility and practicality have long been the cornerstone of the approach of this Court in dealing with the practical problems of law enforcement that fall within the purview of the Fourth Amendment. Thus, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court recognized that police officers must have flexibility greater than that allowed by the Fourth Amendment probable cause requirement to deal with potentially dangerous confrontations with criminal suspects, and adopted the reasonable suspicion standard. Additionally, in *New York v. Belton*, 453 U.S. 454 (1981), the Court adopted a bright line rule for the search of motor vehicles that comported with the practical exigencies that officers face in dealing with custodial

arrests of occupants of vehicles. Finally, in *United States v. Leon*, 468 U.S. 897 (1984), this Court recognized the essentially practical basis for the Fourth Amendment exclusionary rule, i.e., deterrence, and ruled in favor of a Fourth Amendment jurisprudence bound not by technicalities but by the practical realities of the difficult and dangerous tasks of law enforcement officers in the real world of the Twentieth Century.

Many more examples could be given, but *amici* simply request that the Court—as it has in the past—give due deference to the practical realities of law enforcement in executing search warrants in felony drug cases. We echo the words of the court in *State v. Curtis*, 681 So. 2d 1287 (La. App. 1996), that "drug traffickers and users have a violent lifestyle, which is exhibited by the criminal element who are generally armed due to the nature of their illicit business."

In addition to statutory regulation of police activity in this area of operations, there is the matter of police administrative policy, rules and regulations. *Amici* believe that this entire subject should be addressed by every agency's administrative guidance.

Amici respectfully request this Court to not create a constitutional imperative of knock and announce in cases involving felony drug charges. As this Court wisely noted in the majority opinion of Justice O'Connor in *Davis v. United States*, 114 S. Ct. 2350 (1994), there is a *critical difference* between a sound *police practice* and a *constitutional imperative*, a position taken by *amici* AELE, IACP, and NSA in the recent case of *Ohio v. Robinette*, 117 S. Ct. 417 (1996), and, in effect, adopted by this Court in that case on the issue of advisement of rights in consent-to-search cases.

An inflexible constitutional imperative of knock and announce unless specific exemption has been given by an issuing magistrate ignores the realities of the special dangers posed by felony drug cases and the fast-moving events that usually attend

such activities, and needlessly places the lives of law enforcement officers at greater than tolerable risk.

CONCLUSION

Amici urge this Court to affirm the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

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APPENDIX

Nebraska Revised Statutes Section 29-411 (1996).

29-411. Warrants and arrests; powers of officer; direction for executing search warrant; damages

In executing a warrant for the arrest of a person charged with an offense, or a search warrant, or when authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance; or without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice, but the political subdivision from which such officer is elected or appointed shall be liable for all damages to the property in gaining admission. The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice be given; but this section is not intended to authorize any officer executing a search warrant to enter any house or building not described in the warrant.

Utah Code Annotated section 77-23-210 (1996).

77-23-210. Force used in executing warrant—When notice of authority is required as a prerequisite

When a search warrant has been issued authorizing entry into any building, room, conveyance, compartment, or other enclosure, the officer executing the warrant may use such force as is reasonably necessary to enter:

(1) if, after notice of his authority and purpose, there is no response or he is not admitted with reasonable promptness; or

(2) without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.

(12)

Supreme Court, U.S.
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Case No. 96-5955

IN THE UNITED STATES SUPREME COURT

STEINEY RICHARDS,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

On Writ Of Certiorari To
The Supreme Court of Wisconsin

BRIEF FOR AMICI STATES OF OHIO, ALABAMA, ALASKA, ARKANSAS, DELAWARE, FLORIDA, IDAHO, ILLINOIS, IOWA KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, TERRITORY OF GUAM, AND COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENT

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STATEMENT OF *AMICI* INTEREST

Amicus State of Ohio and 27 other *amici* States write to support their sister State, respondent Wisconsin, and to urge the Court to affirm the decision below.

Like Wisconsin, the *amici* States are responsible for overseeing enforcement of their criminal laws, including their laws prohibiting the sale and consumption of illegal drugs. In doing so, they are concerned not just with adherence to these laws, but also with protecting the law enforcement officers responsible for ferreting out violations and with ensuring that their citizens' privacy interests are respected in the course of this vital law enforcement work. The *amici* States wish to express their view as to how the text of the Fourth Amendment, the history behind its enactment, and the case law speak to the appropriate resolution of this matter.

SUMMARY OF ARGUMENT

The Fourth Amendment protects "the right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures." In measuring the reasonableness of a search, the Court first looks to history to determine whether a relevant tradition informs the content of the Amendment, then (if necessary) balances the law enforcement security interests presented against the individual liberty interests allegedly infringed. *See Wilson v. Arkansas*, _ U.S. _, 115 S.Ct. 1914 (1995).

1. History is informative (though not dispositive) in this instance. It shows that, while the knock-and-announce rule has deep roots in English and early American common law, the rule contained a host of exceptions. Among them were situations in which law enforcement officers faced peril or

risked the destruction of evidence if they honored the announcement rule. Still, history does not end the matter because the common law courts (to the State *amici's* knowledge) never addressed whether a blanket exception to the announcement rule ought to apply solely as a result of the nature of the arrest warrant or the nature of the evidence being sought. Accordingly, the *Wilson* framework applies. Just as compliance with the knock-and-announce rule is "among the factors" to be assessed in determining the reasonableness of a search, *Wilson*, 115 S.Ct. at 1918, so too here: law enforcement's adherence to a recognized exception to the rule counts in determining the reasonableness of a search.

2. Balancing the liberty and security interests implicated by felony-drug searches fills in the gaps of history. On the one hand, the safety of law enforcement officers and the preservation of evidence constitute quintessential security interests that the Fourth Amendment has long respected. The welfare of police officers is particularly acute in this setting: they are in unfamiliar territory, they are in a vulnerable position, and they are about to enter a dwelling in which there are not only illegal drugs but quite often guns. On the other hand, "the right of the people to be secure . . . in their houses" is one of our firmest and most cherished traditions. While that liberty interest diminishes when a search warrant has been granted (because entry ultimately cannot be denied), it does not disappear.

3. Measured against these considerations, the police officers' search in this case fully complied with the Fourth Amendment.

a. The officers knocked first and, before they had a chance to announce who they were, the inhabitants promptly shut the door. In view of this suspicious circumstance and

the fact that they were enforcing a search warrant for easily-disposed narcotics, the officers acted properly in thereafter breaking the door, searching the motel room and arresting petitioner.

b. The more difficult question is whether the proper result here -- non-compliance with the knock-and-announce rule -- invariably applies when officers enforce felony-drug search warrants. No common law precedent exists for such a sweeping exception. Nor does traditional balancing compel such a rule. For example, there may be situations in which the officers know for a fact that the occupants are not armed or that the drug supplies or drug paraphernalia may not be easily disposed. Under these circumstances, the security interests are *de minimis* while the liberty interests remain strong.

The only remaining explanation for adopting a blanket rule is the clarity it affords courts, officers and citizens alike. This is not insignificant. The Court has frequently embraced bright line rules in this area (and other areas of law enforcement) because certainty is a constitutional virtue in and of itself and because certain areas lend themselves to categorical balancing. While a bright-line rule would advantage law enforcement in this instance, that is not always true. Some bright-line decisions advance security interests, *see Maryland v. Wilson*, _ U.S. _, 1997 U.S. LEXIS 1271 (Feb. 19, 1997); others advance liberty interests, *see Mapp v. Ohio* 367 U.S. 643 (1961), *Miranda v. Arizona,* 384 U.S. 436 (1966).

At the end of the day, however, this simply is not a case that lends itself to a categorical rule. In this setting, it is too difficult to respect the value of bright line rules without slighting the Fourth Amendment's textual emphasis on reasonableness. At any rate, most cases in this area will

be susceptible to clear guidance. If the officers have objective evidence that their safety may be imperiled or the evidence jeopardized -- which frequently will be the case in a drug-felony search -- the Fourth Amendment permits them to abandon the formalities of the announcement rule.

ARGUMENT

I. THE FOURTH AMENDMENT PERMITS LAW ENFORCEMENT OFFICERS TO MAKE "NO KNOCK" ENTRIES IN EXECUTING A FELONY-DRUG SEARCH WARRANT WHEN THEIR SAFETY IS IMPERILED OR WHEN THE PRESERVATION OF EVIDENCE IS JEOPARDIZED.

The Fourth Amendment to the Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In assessing the reasonableness of a challenged search or seizure, the Court first looks "to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995). If a relevant tradition exists, one that suggests a meaning of the Fourth Amendment "ascribed to it by the Framers of the Amendment," *id.* at 1916, then the pre-ratification common law either may end the matter (if it speaks clearly to the situation at hand) or offer guidance as to what the guarantee means, see id. Otherwise, the "reasonableness" of a search turns "'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Pennsylvania v. Mimms*, 434

U.S. 106, 109 (1977) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)).

In this instance, history offers a partial answer, balancing a final one. What does history say? *Wilson v. Arkansas* makes clear that the common law generally required an announcement before executing a search or arrest warrant. 115 S.Ct. at 1916. The presence of such an announcement prior to an entry, *Wilson* thus concluded, "forms a part of the reasonableness inquiry under the Fourth Amendment." *Id.* at 1915. But "[t]his is not to say," Wilson was careful to point out, "that every entry must be preceded by an announcement." Id. at 1918. On the contrary, common law courts "recognize[d] that under certain circumstances the presumption in favor of announcement necessarily would give way to contrary considerations," *id.*, including "countervailing law enforcement interests," such as "a threat of physical violence" to the officers or the fear "that evidence would likely be destroyed if advance notice were given," *id.* at 1919 (citing *Ker v. California*, 374 U.S. 23, 40-41 (1963) (plurality opinion); *People v. Maddox*, 294 P.2d 6, 9 (Cal. 1956)).

All told, announcement was the general rule at common law, while peril to the officer and destruction of evidence established general exceptions to the rule. Still, history by no means establishes that law enforcement officers acting on a drug-felony search warrant categorically will have ample justification for abandoning the knock-and-announce requirement. These general exceptions just inform the inquiry. See *Wilson*, 115 S.Ct. at 1918 ("the method of an officer's entry into a dwelling" is "among the factors to be considered in assessing the reasonableness of a search or seizure"). Thus, just as compliance with the knock-and-announce principle is "among the factors" to be assessed in

balancing the reasonableness of a search, so too is adherence to a common law exception a relevant component of the balancing.

What does balancing say? On one side of the equation, peril to law enforcement officers and the potential destruction of evidence represent the classic types of security interests that the Fourth Amendment has long respected. And these security interests almost certainly will be present in most felony drug warrants. But, on the other side, there stands an important liberty interest -- "the right of the people to be secure in their . . . houses." While bright lines offer countless benefits to both sides of the Fourth Amendment balance, they do not always fit within the contextual rubric of the amendment. They do not do so here. Unlike *Pennsylvania v. Mimms* and *Maryland v. Wilson*, this is not a situation in which the liberty interest of the individual invariably bows to the security risks to the officer. Usually, that will be the case. It clearly is the case on this record. It just is not always so.

A. At Common Law The Courts Recognized Numerous Exceptions To The Knock-And-Announce Rule, Including Peril To The Officer And Destruction Of Evidence.

History confirms Wilson's observation that the common law knock-and-announce rule, like many rules, contained exceptions. Indeed, if today's courts balance liberty against security under the Fourth Amendment's touchstone of reasonableness, yesterday's courts did roughly the same thing in balancing the liberty consideration that "every man's home is his castle," Hansard, *Parliamentary History of England* (1813), vol. 15, column 1307 (quoting William Pitt, March 1763), against the security consideration

that "the king's keys unlock all doors," *Brooms Legal Maxims*, 281, 432 (10th ed. 1929), Horace L. Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 541, 800 (1924).

One such reconciliation of these bookend considerations was the way in which courts enforced the knock-and-announce rule. While common law courts long respected this rule, they also recognized several important exceptions to it. For example, in *White & Wiltshire*, 81 Eng. Rep. 709, 710 (K.B. 1619), the court permitted the breaking of a door after the sheriff's bailiffs had been imprisoned while they attempted an earlier execution of the seizure. In *Pugh v. Griffith*, 112 Eng. Rep. 681, 686 (K.B. 1838), the court dispensed with the need for a knock and announce because there was nobody on whom a demand could be made. And in *Mahomed v. The Queen*, 13 Eng. Rep. 293, 296 (P.C. 1843), the court recognized peril to the officer as a legitimate justification for lack of announcement. See id. ("While he was firing pistols at them, were they to knock at the door and ask him to be pleased to open it for them."); Kemal A. Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule*, *16 Search & Seizure* L. Rep. 129 (1989). Nor was any announcement required when the sheriff pursued an escaped prisoner. *Allen v. Martin*, 10 Wend. 300, 304 (N.Y. 1833). *Wilgus*, 22 Mich. L. Rev. at 804. Thus, even the common law recognized that "necessity provides a legitimate exception" to the knock-and-announce principle. 2 William Hawkins, *Pleas of the Crown*, ch. 14, 136 (8th ed. 1824). See also *Miller v. United States*, 357 U.S. at 301, 309 (1958) (recognizing an exception when officers were justified in their belief that persons within the premises were in imminent peril of bodily harm).

Early American decisions also found necessity exceptions to the knock-and-announce rule in order to

reconcile the twin interests in liberty and security. *Read v. Case*, 4 Conn. 166, 170 (1822); Blakey, *The Rule Of Announcement And Unlawful Entry, Miller v. United States* and *Ker v. California*, 112 U. Pa. L. Rev. 499, 505-508 (1964). Indeed, as this Court noted in *Ker*, the early American courts took the English exceptions and expanded them. *Ker*, 374 U.S. at 54 (Brennan, J., dissenting). See *People v. Maddox*, 294 P. 2d 6 (Cal. 1956) (determining that compliance is not required if the officer's peril would have been increased or the arrest frustrated); Sonnenreich & Ebner, *No Knock and Nonsense, An Alleged Constitutional Problem*, 44 St. John's L. Rev. 626, 630 (1970). Indeed, as one commentator has observed, "[t]here are apparently no English decisions acknowledging the existence of an exception to the knock and announce rule based on the imminent or likely destruction of evidence. This exception is distinctly American." Jennifer M. Goddard, *Note: The Destruction Of Evidence Exception To The Knock And Announce Rule: A Call For Protection Of Fourth Amendment Rights*, 75 B.U. L. Rev. 449, 462 n.80 (1995). Finally, "[t]he common law principle gradually was applied to cases involving felonies, but at the same time the courts continued to recognize that under certain circumstances the presumption in favor of announcement necessarily would give way to contrary considerations." *Wilson*, 115 S. Ct. at 1918.

Continuity and change marked the common law evolution of the knock-and-announce rule in England and in this country. Generally speaking, the rule took hold in this country, as did exceptions to it. What changed over time was the nature of the exceptions as new forms of criminal activity required new responses. "Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as

proper." *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981). Today federal and state courts all agree that "exigency" covers more exceptions than it did in 1791 or 1868 because new crimes and new threats to police officers (not present in earlier times) created new exigencies. Annotation: *Sufficiency Of Showing Of Reasonable Belief Of Danger To Officers Or Others, Excusing Compliance With "Knock And Announce" Requirement - State Criminal Cases*, 17 A.L.R. 4th 301 (1996); Martin O. Mier, Annotation: *What Constitutes Violation of 18 U.S.C. §3109 Requiring Federal Officer To Give Notice Of His Authority And Purpose Prior To Breaking Open Door Or Window Or Other Part Of House To Execute Search Warrant*, 21 A.L.R. Fed. 820 (1996).

B. Reconciling Security And Liberty Interests In This Instance Authorizes An Exception To The Knock-And-Announce Rule And Customarily Will Do So In The Context Of Felony-Drug Search Warrants.

In accordance with the text of the Fourth Amendment, and its "flexible requirement of reasonableness," *Wilson*, 115 S.Ct. at 1918, and in accordance with the common law recognition of an evolving necessity exception to the knock-and-announce principle, it is appropriate to consider the security interests of law enforcement officers in conducting felony drug searches and the liberty interests of the citizenry in the privacy of their homes. Together, these factors demonstrate that an exception to the knock-and-announce principle is warranted in this case and almost invariably will be warranted in conducting such searches.

1. Law Enforcement Officers Face Serious Risks To Themselves And To The Destruction Of Evidence In Conducting Felony-Drug Searches.

Enforcing State narcotics laws is a perilous enterprise. "Statistics indicate that drug related violence is a growing contributor to police mortality. From 1977 to 1986, 6.5% or 57 of 875 slain officers died in situations involving drug crimes. In 1985, 7.6% of police murders were drug related, and in 1986, 10.6% of police murders involved drug matters." Donald B. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why The No-Knock Warrant Is An Idea Whose Time Has Come, 64 Notre Dame* L. Rev. 552, 558 n.32 (1989) (Statistics extracted from Federal Bureau of Investigation, Crime In The United States; Uniform Crime Reports 1977-1986). Recent statistics show that between 1985-1994, 53 of 708 slain officers died in drug related matters. Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted 1994, at 31, 34.

Regrettably, statistics do not reveal the numbers of officers assaulted during the execution of warrants, let alone during the execution of warrants in drug cases. However, the sheer number of officer injuries, together with the high percentage of law enforcement work devoted to drug interdiction, confirms the dangers inherent in such work. In 1994 alone, 64,912 line-of-duty assaults were reported resulting in 23,194 injuries and 76 deaths. Uniform Crime Reports, 1994 at 3, 73. FBI statistics show that between 1990 and 1994, the number of police officers murdered in the line of duty increased by 15%. Uniform Crime Reports, 1994 at 3. And between 1985-1994, 708 officers were killed. Uniform Crime Reports, 1994 at 29.

Knock-and-announce drug searches pose unique dangers to the police. Narcotics traffickers frequently are well armed, Allegro, 64 Notre Dame L. Rev. at 560 n.49, as this Court has noted in discussing the high correlation between drugs and guns, *Michigan v. Summers*, 452 U.S. 692 (1981). "As common sense, and bitter experience, would suggest, the law has uniformly . . . recognized that substantial dealers in narcotics possess firearms and that such weapons are as much tools of the trade as more commonly recognized drug paraphernalia." *United States v. Payne*, 805 F.2d 1062, 1065 (D.C. Cir. 1986).

Drug houses also regularly are fortified with steel doors, barred windows and other obstacles to slow down entry of police officers armed with warrants. Allegro, 64 Notre Dame L. Rev. at 561. And drug houses may be equipped with sophisticated cameras and electronic surveillance devices. Allegro, 64 Notre Dame L. Rev. at 561 n.52. More importantly, police are at a distinct disadvantage when executing such a search warrant. When they announce their authority and purpose, they make themselves readily identifiable. The occupants generally may be able to see the officers or know that they are close to the door. On the other hand, the officers may not be able to see the occupants and certainly may not know if they intend to resist. An announcement may simply give the occupants the opportunity to arm themselves. Id. at 566. "Once police officers seeking to enter a drug traffickers' enclave have announced their identity and authority, they stand before the door blind and vulnerable." *United States v. Bonner*, 874 F.2d 822, 824 (D.C. Cir. 1989). This phenomenon is called the "fatal funnel": The suspect always knows where the officer will be, while the officer's only advantage -- the element of surprise -- disappears the moment an announcement is made. Allegro, 64 Notre Dame L. Rev. at 566.

Even after the officer enters the house, the advantage remains with the inhabitants. They know the interior of the house, and frequently will use their position to fire first. *Maryland v. Buie*, 494 U.S. 325, 333 (1990). By contrast, the "risk of harm to both the police and the occupants [of an area subject to a search] is minimized if the officers routinely exercise unquestioned command of the situation." *Summers*, 452 U.S. at 702-03.

Nor can there be any doubt about the risk of destruction of evidence in this setting. Illegal drugs readily lend themselves to immediate destruction. See *Ker*, 374 U.S. at 23. The cases are legion in which police officers have caught offenders attempting to flush narcotics down the toilet. See Angie Brunkow, *Police Arrest Mother, Girls In Crack Raid*, Omaha World-Herald, May 4, 1995, at 13SF (Mother and 14 year old daughter caught trying to swallow bags of crack); Loren Keller, *Drug Suspect, Loot Fall From Roof of House*, Omaha World-Herald, Aug. 9, 1996, at 24.

2. Individuals Have A Strong Liberty Interest In the Privacy Of Their Home, Though That Interest Is Diminished When A Felony Drug Search Or Arrest Warrant Has Been Issued.

At the same time, individuals no doubt have a strong interest in protecting the privacy of their home from unwarranted intrusions. In holding that "the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering," 115 S.Ct. at 1916, Wilson properly recognized the important common law and Fourth Amendment protections to be "secure" in one's home. Other

decisions from this Court are to the same effect. *Maryland v. Buie*, 494 U.S. 325 (1990).

Of course, the existence of a search warrant for drugs in one's home lessens that security interest. Once a warrant has been issued, the privacy interests diminish significantly because entry may not be denied to officers possessing a valid warrant. See. Sonnenreich and Ebner, 44 St. John's L. Rev. at 647. Announcement or not, entry ultimately will be obtained after a warrant has been obtained.

Still, adherence to the knock-and-announce rule plainly protects certain time-honored liberty interests. In addition to protecting the individual's privacy, it decreases the potential for violence by alerting the inhabitant that the officer is legitimately on the property and it prevents the destruction of property by giving the resident an opportunity to open the door voluntarily. These interests are not insignificant.

3. The Balancing Of Interests In This Case Clearly Weighs In Favor Of The State.

As applied to the facts of this case, the balancing of interests clearly tilts in the State's favor. The officers properly obtained a warrant to search petitioner's motel room for evidence of "the felonious crime of Possession with Intent to Deliver a Controlled Substance" in violation of State law. *State v. Richards*, 549 N.W. 2d 218, 220 (Wis. 1996). In doing so, they initially sought permission from the magistrate to obtain a no-knock warrant, which is to say they asked the magistrate to issue a warrant specifically authorizing their unannounced entry. Id. at 228 n.3 (Abrahamson, J., concurring) The magistrate denied their request. When the officers reached petitioner's motel room,

they knocked on the door (though they did not announce who they were). Id. The door opened and, before the officers had a chance to identify themselves, petitioner and at least one other individual shut the door. Under any conceivable test of necessity, the officers plainly complied with the Fourth Amendment in proceeding to break the door open and arrest petitioner. The highly suspicious response to their arrival, plus the immediate risk of destruction of evidence, more than sufficed to excuse compliance with any additional formalities.

4. While Peril To The Officer And The Risk Of Destruction Of Evidence Customarily Will Excuse Announcement In Executing Search Warrants For Drug Felonies, The Fourth Amendment Does Not Permit A Blanket Rule In This Area.

The harder question is whether the proper result here -- non-compliance with the announcement rule -- invariably applies when police officers execute felony-drug search warrants. The answer is a qualified no. Normally, the generalized peril to officers conducting such searches together with the risk of destruction of evidence will give them discretion to abandon the niceties of knocking and announcing their presence. But, because easily-imagined situations exist in which objective evidence will substantially (if not entirely) diminish these dangers, it is not appropriate to establish a categorical no-knock rule.

First, the common law does not support such a blanket exemption. Each of the traditional exceptions to the announcement rule involved discrete exigencies that made

compliance foolish or dangerous. See supra. None of the recognized exceptions to the rule at common law, in short, was as all encompassing as the test announced by the lower court.

Second, not all drug-felony searches present the compelling risks to officers and evidence that the lower court identified. It is not difficult to imagine settings in which officers have objective evidence establishing that compliance with the announcement rule neither imperils them nor jeopardizes the desired fruits of their search. For example, they may know for a fact that the residents are not armed or dangerous. Or they may know that the quantity of drugs, the types of drugs or the sorts of drug paraphernalia cannot readily be destroyed. Either way, a blanket rule for all drug-felony searches threatens to swallow the knock-and-announce rule and in the end disrespect the reasonableness touchstone of Fourth Amendment inquiries. Accordingly, while objective threats to police officer safety and prevention of the destruction of evidence will entitle the officers to exercise their discretion in determining whether to announce their arrival, the Fourth Amendment does not invariably give them that choice simply because drugs are involved.

Third, the only remaining justification for affirming a blanket rule in this area is the benefit of offering clear guidance. While this is an important consideration, it does not in the last analysis justify such a decision here.

As an initial matter, the Wisconsin's Supreme Court's decision to adopt a bright line rule is not a disqualifying factor. Even in the Fourth Amendment, the Court has recognized the utility of providing clear benchmarks to officers and citizens alike. In many cases, reasonableness balancing may be done categorically, thereby providing guidance to courts, officers and citizens alike. See *Maryland*

v. Wilson, 1997 U.S. LEXIS 1271 (Feb. 19, 1997) (officers may order occupants of automobile to exit upon stop); *Mimms*, 434 U.S. at 111 (officers may order driver of automobile to exit upon stop); *United States v. Robinson*, 414 U.S. 218 (1973) (officers may search person incident to a lawful arrest); *Michigan v. Summers*, 452 U.S. 692 (1981) (officers may detain occupant of premises while executing search warrant); *New York v. Belton*, 453 U.S. 454 (1981) (officers may search passenger compartment of automobile as search incident to arrest); *Colorado v. Bertine*, 479 U.S. 367 (1987) (inventory search of automobile). See also Wayne R. LaFave, *"Case-By-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1994 S. Ct. Rev. 127 (1974); Albert W. Alschuler, *Bright Line Fever And The Fourth Amendment*, 45 U. Pitt. L. Rev. 227 (1984).

Nor do bright-line rules necessarily favor security over liberty interests. Many of the Court's categorical rulings in this area, to be sure, err on the side of protecting law enforcement. See, *e.g.*, *Wilson*, 1997 U.S. LEXIS 1271; *Mimms*, 434 U.S. at 106. But many of the decisions in this area (and in the Fifth Amendment as well) err on the side of protecting the individual. See *Edwards v. Arizona*, 451 U.S. 477 (1981) (once suspect has invoked right to counsel, interrogation must cease until counsel made available or the suspect initiates further communication); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

Thus, just because bright line rules invariably overprotect one side of the Fourth Amendment equation at the expense of the other does not disqualify them. They remain an indispensable part of the Court's jurisprudence in this and other areas in view of the clarity of guidance they provide. "[A] single familiar standard is essential to guide police officers who have only limited time and expertise to

reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Colorado v. Bertine*, 479 U.S. at 375 (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981)). Compare Stevens, *The Bill of Rights: A Century of Progress*, 59 U. Chi. L. Rev. 13 (1992) with Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

In this instance, it could fairly be argued that the overprotection of security interests is simply the price of a system of clear precedents, a price that should be accepted in this case in view of the frequency with which this issue will arise in the future and the need for guidance from the Court. The price, however, is too steep here. The lack of a blanket exception at common law, the ultimate requirement of reasonableness balancing under the text of the Fourth Amendment, *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996), and the traditional privacy interests long associated with the home simply do not allow such a rule here.

Nonetheless, most cases in this area are susceptible to clear guidance. If the officers have objective evidence that their safety may be imperiled or the evidence jeopardized -- which normally will be the case in a drug-felony search -- the Fourth Amendment gives them the discretion to abandon the formalities of the announcement rule. Thus, even though police officers may not be entitled to the complete discretion that a blanket rule would give them, they still deserve great deference in making rapid, life-and-death judgments about how best to proceed in executing a felony-drug search warrant. See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) ("the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving").

CONCLUSION

For the foregoing reasons, the amici States respectfully request the Court to affirm the decision below.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

STEINEY J. RICHARDS
Petitioner,

v.

THE STATE OF WISCONSIN
Respondent.

On Writ of Certiorari To The Supreme Court of The State Of Wisconsin

BRIEF OF AMICUS CURIAE WAYNE COUNTY, MICHIGAN, IN SUPPORT OF THE RESPONDENT

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STATEMENT OF THE QUESTION

I.

GIVEN THAT IT IS REASONABLE UNDER THE FOURTH AMENDMENT FOR OFFICERS EXECUTING A SEARCH WARRANT TO FOREGO KNOCKING AND ANNOUNCING THEIR PRESENCE AND PURPOSE WHEN TO DO SO WOULD RESULT IN AN UNREASONABLE RISK OF LOSS OF THE SOUGHT EVIDENCE OR HARM TO THE OFFICERS, CAN THAT REASONABLENESS CAN BE DEMONSTRATED ON A "CATEGORICAL" BASIS; FURTHER, EVEN IF NOT, IS EXCLUSION OF EVIDENCE AN APPROPRIATE SANCTION WHERE THE EVIDENCE IS NOT THE FRUIT OF THE FAILURE TO KNOCK AND ANNOUNCE, BUT IS THE FRUIT OF THE OTHERWISE PROPER EXECUTION OF A VALID WARRANT?

INTEREST OF THE AMICUS

Amicus is the County of Wayne, Michigan, by the Wayne County Prosecutor's Office. The Office of the Wayne County Prosecuting Attorney is the largest in the State of Michigan, and the issue before this Court is of great practical consequence to law enforcement. Thousands of search warrants are executed annually in the State, the greater proportion of them involving searches for narcotics, and thus the issue before the Court is of great interest and importance to a large metropolitan area such as the Detroit area.

Counsel for amicus has appeared before the Court on four occasions, and the Wayne County Prosecutor's Office has appeared on nine occasions. Amicus has also filed as amicus previously before the Court, as well as before the Michigan Supreme Court. The issue before the Court is of great practical importance, and amicus desires to present its perspective for the possible assistance of the Court.

STATEMENT OF THE CASE

Amicus concurs with the statement of the case of the State of Wisconsin, as Respondent.

ARGUMENT

GIVEN THAT IT IS REASONABLE UNDER THE FOURTH AMENDMENT FOR OFFICERS EXECUTING A SEARCH WARRANT TO FOREGO KNOCKING AND ANNOUNCING THEIR PRESENCE AND PURPOSE WHEN TO DO SO WOULD RESULT IN AN UNREASONABLE RISK OF LOSS OF THE SOUGHT EVIDENCE OR HARM TO THE OFFICERS, THAT REASONABLENESS CAN BE DEMONSTRATED ON A "CATEGORICAL" BASIS; FURTHER, EVEN IF NOT, EXCLUSION OF EVIDENCE IS AN INAPPROPRIATE SANCTION WHERE THE EVIDENCE IS NOT THE FRUIT OF THE FAILURE TO KNOCK AND ANNOUNCE, BUT IS THE FRUIT OF THE OTHERWISE PROPER EXECUTION OF A VALID WARRANT.

A. *The Common Law, And Fourth Amendment "Reasonableness"*

Before examining the common law with respect to the issue of "knock and announce" before a search warrant is executed, it is first necessary, amicus believes, to decide whether the common law on the point makes any difference with regard to interpretation of the Fourth Amendment and the requirement that all searches be reasonable. Amicus submits that the common law is of utmost importance to the question, as demonstrated by cases from the Court.

That common law traditions inform judgments regarding the meaning of the Fourth Amendment is beyond question, and therefore the

point will not long be labored here. A mere sampling of cases from this Court makes the point. In *Gerstein* v *Pugh*, 420 US 103, 43 L Ed 2d 54, 95 S Ct 854 (1975), for example, the Court held that the Fourth Amendment "requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest," the Court grounding its decision in large part on the fact that its result had "historical support in the common law that *has guided interpretation of the Fourth Amendment*" (43 L Ed 2d at 64, emphasis supplied).

The Court looked to common law principles for guidance in *United States* v *Watson*, 423 US 411, 46 L Ed 2d 598, 96 S Ct 820 (1976) in determining that no arrest warrant is needed for an arrest in a public place. Canvassing authorities such as Blackstone, Hale, and English cases, the Court observed that "The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest," 46 L Ed

2d at 606-607, noting further that "The balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact." 46 L Ed 2d at 608. See also the concurring opinion of Justice Powell, 46 L Ed 2d at 612-613.

In *Payton* v *New York*, 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371 (1980) the Court considered whether warrantless entries into the dwelling to achieve arrests based on probable cause are permissible. Though concluding not, both the majority and the dissent looked heavily to the common law, the majority concluding that the authorities regarding the common law rule revealed a deep divergence of opinion among scholars, and very few judicial opinions. The majority thus concluded that its study of the relevant common law simply did not provide sufficient guidance to inform the decision, 63 L Ed 2d at 658, the dissent taking issue with the majority on its understanding of the common law on the question, and being of the view that the "Fourth Amendment was directed towards safeguarding the rights at common law...." 63 L Ed 2d at 665. Similarly, in *Steagald* v *United States*, 451 US 204, 68 L Ed

2d38, 101 S Ct 1642 (1981) the majority of the Court declined to use the common law as a guide to decision of the question whether entry into the home of a third party to arrest a nonresident can be accomplished without a search warrant because "the common law...sheds relatively little light on the narrow question before us...." 68 L Ed 2d at 50.

The Court turned to the common law in *Oliver* v *United States*, 466 US 170, 80 L Ed 2d 214, 104 S Ct 1735 (1984) as an aid to determining whether the term "houses" in the description of the Fourth Amendment as to that which is protected from unreasonable searches and seizures ("persons, houses, papers, and effects") includes open fields, or is limited to the curtilage of the dwelling. See 80 L Ed 2d at 225, the Court finding that, as Justice Holmes had said, the difference between the curtilage and the open field is as "old as the common law." See also *California* v *Ciraolo*, 476 US 207, 90 L Ed 2d 210, 106 S Ct 1809 (1986); *Dow Chemical* v *United States*, 476 US 227, 90 L Ed 2d 226, 106 S 2Ct 1819 (1986); *United States* v *Dunn*, 480 US 294, 94 L Ed 2d 326, 107 S Ct 1134 (1987).

The question in *California* v *Hodari D.*, 499 US 621, 113 L Ed 2d 690, 111 S Ct 1547 (1991) was whether an individual in full flight can be considered "seized" under the Fourth Amendment because of the objective manifestation of the police of a *desire* to seize him. The Court looked to the common law to reject this rather extravagant claim of meaning of the word "seizure." See 113 L Ed 2d at 696-697.

Finally, this Court, of course, considered the common law practice as paramount in *Wilson* v *Arkansas*, 514 US__ 131 L Ed 2d 976, 115 S Ct__ (1995). Reviewing Blackstone and early English cases, as well as Sir Matthew Hale, and also early American statutes and cases, this Court held that a "knock and announce" is presumptively required as a part of that reasonableness demanded by the Fourth Amendment. The Court also made clear, however, that the common law announcement principle was not inflexible, a point to which amicus will return.

The foregoing is but a sampling of the many cases in which the Court has turned to the common law as an aid to determining that which is encompassed within the protections provided by the Fourth

Amendment. Plainly it can at least be said that practices at common law are highly relevant to understanding the protections supplied by the text of the Fourth Amendment. More particularly, then, they are relevant to the question of whether the reasonableness clause requires that warranted searches of premises be preceded by an announcement from the police of their presence and purpose, and, if so, what the contours of that requirement are, as well as the scope of any exceptions to it.

B. ***There Was A Common Law Requirement of Announcement of Presence and Purpose Before Forcible Entry to Execute A Warrant, Which Informs the Reasonableness Clause***

As indicated, common law practices inform our understanding of the Fourth Amendment, and in *Wilson* this Court found that "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment," noting as well, however, that "This is not to say, of course, that every entry must be preceded by an Announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests."

131 L Ed 2d at 982. There are plainly circumstances where a forcible entry to execute a warrant is permissible absent announcement of presence and purpose, as the common law itself recognized.

C. ***The Exceptions To The Common Law Rule***

That the reasonableness clause does not require that police executing a search warrant knock and announce their presence and purpose in some circumstances is universally accepted, and without controversy. Essentially, announcement of presence and purpose before forcible entry may be undertaken is not required when, considering the purpose of the warrant, it would in fact be *unreasonable* to require the police to do so. The purpose of the search warrant is to allow the police to search for and to seize items named in the warrant, and, of course, to do so in safety. See *Michigan* v *Summers*, 452 US 692, 69 L Ed 2d 340, 101 S Ct 2587 (1981). Announcement of presence and purpose assures that forcible entry will not result in destruction of property, and possibly cause violence itself, unless peaceful entry is directly or indirectly refused. Where announcement of presence and purpose, then, will lead

either to frustration of the warrant through destruction or concealment of the items sought, or is dangerous to the officers executing the warrant, or is a "useless gesture" because it is clear from the facts surrounding the execution of the warrant that those present were aware that the police were present and of their purpose, the reasonableness clause does not require the announcement of presence and purpose as a prerequisite to forcible entry. Again, these principles are universally accepted and long established. See generally 2 LaFave, *Search and Seizure*, sec. 4.8(d), (e), and (f). What of their application in today's world?

D. *Reasonableness and Knock and Announce in the 20th and 21st Centuries*

Amicus is firmly of the belief that the Constitution does *not* "change with the times," with those changes being made by judges; rather, if the People so desire, the Constitution may be changed through the amendment process, as it has been on many occasions, and as the Constitution itself plainly contemplates. Certainly the concepts or principles expressed in the Constitution may be applied to circumstances not envisioned by the Framers, but the concepts themselves--the

Constitution itself--remains constant.

A thorough examination of the appropriate method of constitutional interpretation cannot be undertaken here, but amicus would pause a moment to point to several statements by giants of Michigan jurisprudence on the point--giants in jurisprudence at the time of their service, and giants in our nation's history. Justice Thomas Cooley, in his celebrated work *Constitutional Limitations* (1868; Legal Classics Library Edition, 1987), stated that "The object of construction, as applied to a written constitution, is *to give effect to the intent of the people in adopting it."* Cooley, at 55 (emphasis in the original). This method of construction is a part of our jurisprudential history. The court is to "*declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." Cooley, at 55.

Another giant of Michigan jurisprudence, and contemporary of

Justice Cooley on the Michigan Supreme Court, Justice Campbell, put it this way in *People* v *Blodgett*, 13 Mich 127, 138 (1865): "The meaning of our constitution was fixed when it was adopted, and the question which is now before us is not different from what it would have been had the constitution been recently adopted....Constitutions cannot be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of government, until they are amended or abrogated by the action prescribed by the authority which created them."

This does *not*, however, mean that the constitution is "static" in that it cannot be applied to unforeseen events or developments (such as modern technology) --surely, its principles can be applied to new or changed circumstances, as Justice Campbell himself recognized over 125 years ago: "That the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as *meant to apply to the present state of things* as well as to all other past or future circumstances." *Blodgett*, at 140 (emphasis added).

The *principles* do not change--the constitution does not change to meet the times--the constitution is simply capable of *application* to new or different circumstances.

Assuming that at the common law there was a requirement of announcement of presence and purpose before a forcible entry to execute a warrant could be made, and assuming that the reasonableness clause of the Fourth Amendment is informed by common law practices, it is also true that there are exceptions to the knock and announce requirement. How is the requirement itself to be viewed, and what is the scope of its exceptions, in a modern world?

In *Minnesota* v *Dickerson*, __US__, 124 L Ed 2d 334 (1993), Justice Scalia, while concurring with the majority, expressed concern regarding the "frisk" component of *Terry* v *Ohio*, 392 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968). Justice Scalia agreed that the "stop" portion of Terry comports with common law practices, see 124 L Ed 2d at 349, but could find no common law precedent for any physical search incident to that stop. 124 L Ed 2d at 349. In remarks consistent with the views of

Justices Cooley and Campbell quoted previously, Justice Scalia explained that common law practices are important to the constitutional inquiry because, in his view, a view with which amicus agrees, it is a "fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification." 124 L Ed 2d at 348. However, just as Justice Campbell further cautioned that it is also true that the Constitution "must be regarded as *meant to apply to the present state of things* as well as to all other past or future circumstances," Justice Scalia agreed that even if a frisk prior to arrest would have been impermissible in 1791, or in 1868 when the Fourteenth Amendment was adopted, it might well be that "it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common--which might alter the judgment of what is 'reasonable' under the original standard." 124 L Ed 2d at 350. Similarly, the question here is the *application* or scope of the reasonableness standard, which is informed by common law practices--a requirement of announcement of

presence and purpose before forcible entry to execute a search warrant, with exceptions to the requirement when there is sound reason to believe announcement will frustrate the purpose of the warrant, will lead to harm of the executing officers, or is an "empty gesture" because it is clear from the circumstances that those inside are already quite aware of the presence and purpose of the police--in a modern world which is, in terms of possible harm to officers executing warrants and possible frustration of warrants through destruction of evidence (especially in drug cases), quite different from the world of 1791 and that of 1868.

Amicus would point to one other case demonstrating that common law principles may be applied somewhat differently to a changed world. In *Tennessee* v *Garner*, 471 US 1, 85 L Ed 2d 1, 105 S Ct 1694 (1985) this Court considered the degree of force permissible under the reasonableness clause in order to effectuate the arrest of a fleeing felon. Justice White, writing for the Court, recognized that at the common law whatever force was necessary to effect the arrest of a fleeing felon was permissible, including deadly force, without regard to whether

the felony which had been committed was a violent one, and without regard to any standard of cause as to whether the fleeing felon was armed, citing to Hale and Blackstone. While agreeing that this Court has "often looked to the common law in evaluating reasonableness, for Fourth Amendment purposes," Justice White also expressed the view that common law practices do not necessarily govern where there has been a "sweeping change in the legal and technological context...." 85 L Ed 2d at 11.

Justice White turned then to the "sweeping change in the legal and technological context," noting, among other things, that the common law rule arose at a time when virtually all felonies, including nonviolent felonies, were punishable by death, and at a time when many offenses now classified as felonies were either misdemeanors or did not exist. Further, technology with regard to weaponry has changed from the time of the common law rule, where deadly force "could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk." 85 L Ed 2d at 12. Because, then, the

premises underlying the common law rule simply no longer exist, the common law rule could not, held the Court, supply the reasonableness test under the Fourth Amendment, at least not entirely.

Caution and restraint, however, must be exercised when, in construing reasonableness under the Fourth Amendment, the Court departs from common law practices, for the Court is then open to the charge of legislating, and to illegitimacy. Indeed, amicus would contend that *Garner* itself pushes the outer edges of appropriate judicial construction of the Constitution. The issue of the relationship between the reasonableness clause and announcement of presence and purpose before a warrant is executed in light of modern developments both in terms of weaponry, and therefore danger to the officers executing the warrant, and the ready disposability of contraband, and consequently the frustration of the warrant, however, does not require the sort of *abrogation* of a common law principle as in *Garner*, but simply the recognition that the purposes underlying the understood *exceptions* to the "knock and announce" requirements extend to situations today not

envisioned at the common law, so that the "knock and announce" requirement may be dispensed with in certain *classes* of searches on a *blanket* basis, consistent with the reasonableness clause.

The question becomes whether announcement of presence and purpose may be excused on the ground of a reasonable fear of destruction of the items sought through the warrant and a reasonable fear of injury to executing officers if presence and purpose *are* announced in certain *classes* of cases, or can only be determined on an *individual* case-by-case basis. Consistent with the remarks of Justice Scalia concurring in *Minnesota v Dickerson*, amicus would point out that it is quite clear that circumstances have changed since 1791, and since 1868 when the Fourteenth Amendment was adopted, changes "which might alter the judgment of what is 'reasonable' under the original standard." Indeed, the position of amicus is in fact more limited--it is not that the standard of reasonableness has altered, it is that reasonableness may be *demonstrated* with regard to an unannounced forcible entry to execute a search warrant for the same reasons it has always been deemed reasonable, but that

showing may, in light of modern circumstances, now be made in certain *classes or categories* of cases.

The Wisconsin case reaffirmed by the instant case is of *State* v *Stevens*, 511 NW2d 591 (Wis, 1994). Announcement of presence and purpose serves, said the court, to protect officers and others by warning the occupants of the officers' impending entrance; it protects the occupants limited privacy interests where the police have judicial authorization to enter and search; and it helps prevent the physical destruction of property. Where these interests would not be served, or would be counterproductive to safety and lead to frustration of the warrant, it is not reasonable to require that the police knock and announce. 511 NW2d at 595. Can it be said, in a class of cases, that it is reasonable for the police to believe that knocking and announcing will lead to frustration of the warrant and danger to themselves? The Wisconsin Supreme Court answered in the *affirmative*.

The specific holding of the court was that "when the police have a search warrant, supported by probable cause, to search a residence for

evidence of delivery of drugs or evidence of possession with intent to deliver drugs 'evidence of drug dealing', they necessarily have reasonable cause to believe exigent circumstances exist. Thus, in *all such searches* the police are justified in dispensing with the rule of announcement and making a no-knock entry." 511 NW2d at 595 (emphasis added).

In a modern world it is clear, said the court, that the object of the search warrant in drug cases is easily capable of destruction: "Several jurisdictions have acknowledged that most drugs are easily disposed of using standard plumbing." 511 NW2d at 595. The court observed that "At least six other courts have adopted such a 'blanket' exception to the rule of announcement." 511 NW2d at 596 (citations omitted). See also *United States* v *Moore*, 956 F2d 843, 850 (CA 8, 1992): "It is reasonable for police officers to assume that suspects selling illegal drugs in small quantities from a residence that has normal plumbing facilities will attempt to destroy those drugs if officers knock before a search warrant is executed."

Moreover, with regard to the dangers of unannounced entry, the

court found that the assumption that unannounced entry might lead to violence as opposed to announced entry which would not is "no longer valid in today's drug culture. In fact, by announcing their presence, police may actually increase the likelihood for violence. 'The law has 'uniformly...recognized that substantial dealers in narcotics possess firearms and that such weapons are as much tools of the trade as more commonly recognized drug paraphernalia."" 511 NW2d at 596. See also Bureau of Justice Statistics, *A National Report: Drugs, Crime, and the Justice System*, at 5 (Dec, 1992): "To avoid being arrested and punished for trafficking, drug dealers commit violence crimes against police...."

The historical notion that following the rule of announcement is more likely to prevent violence the court simply found untrue in the context of drug searches, where "Police departments and commentators have determined that the police can *decrease* the possibility for violence during a search by taking control of the situation quickly." 511 NW2d at 597. The court thus found that the purpose of knock and announcement of avoiding injury to the executing officers and to occupants of the

building is in fact *disserved* in certain drug cases. In the instant case the Wisconsin Supreme Court reaffirmed *Stevens* as unaffected by this Court's decision in *Wilson*. *State* v *Richards*, 549 NW2d 218 (Wis., 1996). As noted by the court, *Wilson* "does not forbid blanket rules; rather, it requires such rules to be supported by the standard of 'reasonableness.' The Court left it to the lower courts to determine 'the circumstances under which an unannounced entry is reasonable under the Fourth Amendment." *Richards*, at 222.

In neither 1791 nor 1868 did today's drug problem exist, where thousands of search warrants are executed with regard to a class of contraband which is readily disposable, with the means of disposal, modern plumbing, readily reachable after the police knock and announce that they are there to search for and seize this very contraband. Nor did modern weaponry exist at these times. It has always been permissible under the reasonableness clause to make forcible entry to execute a warrant without knocking and announcing when the purposes served by knocking and announcing would not be served by so doing. Amicus

simply submits that today it is demonstrably true that as to certain *classes* of cases those purposes are not only not served, but are *disserved* by knocking and announcing. It is permissible, then, under our Federal system for a state to choose to allow forcible entry without knocking and announcing in these classes of cases, as the Constitution will not be violated by this method of search warrant execution. Should a state choose to reach another conclusion under its own constitution, common law, or statutory law, that is its choice, and a part of our Federalism. But the Fourth Amendment reasonableness clause allows the choice where the purposes of knocking and announcing are not served, and allows the States to make that determination on a categorical or "class" basis.

E. *Application Of A Rule of Exclusion of Evidence To Knock and Announce Violations*

Amicus would submit that even if it is found in a particular case that, whatever the scope of the requirement of announcement of presence and purpose, that requirement has been violated, there remains the *critical* question of whether exclusion of evidence as a consequence is appropriate, and amicus submits that it is not, and would note that none

of the early English cases concerning the announcement requirement are criminal cases excluding evidence, but instead are civil suits for damages.

Assume several examples: 1)the police enter a home and search it with no warrant at all, and no exigent circumstances or any other independent justification; 2)the police enter a home and search with a search warrant in areas within the home where the items sought could not possibly be found, finding other seizable items instead, and 3)the police enter a home and search it pursuant to a search warrant, finding the items sought in a search of proper scope and intensity, but after having failed to wait after knocking on the door and announcing their presence and purpose for a time sufficient to allow a person in the room furthest from the door to answer. In the first two situations the invasion of privacy simply *should not have occurred at all*. In the first, the entry into the dwelling *should never have occurred*; in the second, the search of certain places within the dwelling should *never have occurred*. The evidence should never have been discovered, privacy should never have been violated, and exclusion is the result. But in the third situation, with a

valid search warrant, and a search of proper scope, but a "timing" error with regard to entry, was the invasion of privacy--the entry into the home and the search--proper? Surely it ***was***--the police had a right under law to make it. Was the seizure of property appropriate? Surely it ***was***--the police had a right under law to seize it. Does employing the ***same*** "sanction" where the police had every right to search and seize, but entered too quickly, as when the police had no right to invade premises and seize property at all make any sense? Surely ***not***--in two privacy has been improperly invaded; in the latter, the knock and announce "failure," it has been *validly* invaded. Only if knocking and announcing has as a purpose that those inside should be given a fair opportunity either to destroy the evidence sought or to injure the officers executing the warrant does exclusion of the evidence in this situation make sense. These violations are simply different in ***kind***, and, most respectfully, amicus submits that it is myopic to treat them as though they were no different at all. As Chief Justice Warren noted, in a slightly different context:

> "The exclusionary rule has its limitations as a tool of judicial control....[In] some contexts the rule is ineffective

> as a deterrent....Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations....[A] rigid and unthinking application of the...rule...may exact a high toll in human injury and frustration of efforts to prevent crime." *Terry* v *Ohio*, 392 US 1, 13-15; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Exclusion of evidence where there has been a valid invasion of privacy, and a proper discovery and seizure of evidence, then, is not, amicus submits, an appropriate sanction for police "error" with regard to announcement of presence and purpose. There is no element of "causality" involved--whether viewed as a part of the doctrine of inevitable discovery, or simply as a recognition that the discovery of the evidence is not the fruit of a failure to knock and announce, given that the invasion of privacy involved is completely justified--and exclusion makes no sense.

CONCLUSION

WHEREFORE, amicus requests that this Honorable Court affirm the judgment of the Wisconsin Supreme Court.

Respectfully submitted,

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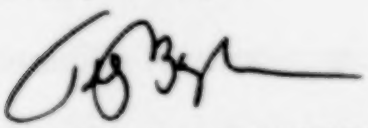

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